# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1948

## No. 388

WELKER B. BROOKS, PETITIONER,

*vs.*

THE UNITED STATES OF AMERICA

## No. 389

JAMES M. BROOKS, ADMINISTRATOR OF THE ESTATE OF ARTHUR L. BROOKS, DECEASED, PETITIONER,

*vs.*

THE UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 30, 1948.

CERTIORARI GRANTED JANUARY 3, 1949.

# SUPREME COURT OF THE UNITED STATES

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[fol. 1]

# IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5758

UNITED STATES OF AMERICA, Appellant,

versus

WELKER B. BROOKS, Appellee.

No. 5759.

UNITED STATES OF AMERICA, Appellant,

versus

JAMES M. BROOKS, Administrator of the Estate of Arthur L. Brooks, Deceased, Appellee.

Appeals from the District Court of the United States for the Western District of North Carolina, at Charlotte

## Appendix to Brief of Appellant

APPENDIX "A"

Section 410 (a) of the Federal Tort Claims Act (60 Stat. 843, as amended, 28 U. S. C. 931 (a)) provides:

> Sec. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to

the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages: *Provided, however,* That in any case wherein death was caused, where the law of the place where the act or omission complained of occurred, provides or has been construed to provide, for damages only punitive in nature, the United States [fol. 2] shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons, respectively, for whose benefit the action was brought, in lieu thereof. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

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[fol. 3] APPENDIX "B"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

Charlotte Civil No. 545

WELKER B. BROOKS, Plaintiff,

v.

THE UNITED STATES OF AMERICA, Defendant

COMPLAINT

The plaintiff, complaining of the defendant, says and alleges:

1. That the plaintiff is a resident of Mecklenburg County, North Carolina.

2. That on the evening of February 17, 1945, the plaintiff and his father, James M. Brooks, and his brother, Arthur L. Brooks, were riding in a two-seated Chevrolet Sedan

belonging to the plaintiff's brother, Arthur L. Brooks; that on said occasion, the said automobile was being driven by the plaintiff's brother, Arthur L. Brooks, the plaintiff's father, James M. Brooks, sitting in the front seat of said automobile beside the plaintiff's brother, Arthur L. Brooks, and the plaintiff sitting alone in the rear seat of said automobile.

3. That at about eight o'clock P. M., after dark on the evening of the aforementioned date, the plaintiff and his father and brother above named were traveling in the aforesaid automobile on a paved highway from Fayette-[fol. 4] ville, North Carolina, to Fort Bragg, North Carolina, the plaintiff's aforesaid brother, Arthur L. Brooks, being at that time a member of the United States Military Forces, on furlough and at that time visiting his said brother at Fort Bragg; that while thus proceeding, the plaintiff and his father and brother approached a point where said highway intersects another paved highway; that on said occasion it was the intention of the plaintiff and his father and brother to enter on to the second highway and proceed thereon the remaining distance to Fort Bragg, but that in order to do so, it was first necessary to cross over half of the second highway in order to get upon the farther lane thereof, on which traffic moved in the direction of Fort Bragg.

4. That upon arriving at the said second highway and before entering thereon, the plaintiff's brother, Arthur L. Brooks, brought the aforesaid automobile to a complete stop; that it appearing that no vehicle was approaching, the said Arthur L. Brooks started his said automobile across the nearer lane of the said highway in order to get upon the farther lane thereof, as hereinabove set forth; that his said automobile had almost cleared the said lane which it was crossing when suddenly it was struck on its left side with terrific force by a motor vehicle traveling, as the plaintiff is informed and believes, without any lights, at a very rapid, excessive, and unlawful rate of speed; that as a result of said motor vehicle striking the said Chevrolet automobile which the said Arthur L. Brooks was driving, the plaintiff was painfully, seriously, and permanently injured.

5. That, as the plaintiff is informed and believes, the motor vehicle which struck the aforesaid Chevrolet automobile was a large motor truck belonging to the United States Army and operated for and in behalf of the United [fol. 5] States Army through its authorities at the military post of Fort Bragg, North Carolina; that said motor truck as the plaintiff is informed and believes, was being operated and driven on the occasion herein referred to by a civilian employee of the defendant, who, as the plaintiff is informed and believes, was operating and driving the said motor truck on the said occasion within the scope of his employment.

6. That the said employee of the defendant was operating and driving the said motor truck on the said occasion in a careless and negligent manner in that he was operating and driving the same at an excessive and unlawful rate of speed, in the dark without any lights thereon, without reasonable and proper attention and regard under the circumstances for the rights of persons in the position of the plaintiff, without reasonable and proper warning under the circumstances to persons in the position of the plaintiff, and without reasonable and proper control of said motor truck, under all the then and there existing circumstances; that such negligence on the part of the defendant's employee was the direct and proximate cause of the injury to the plaintiff hereinabove and hereinafter referred to.

7. That as a result of the aforesaid motor truck striking the automobile in which the plaintiff was riding on the occasion, and under the circumstances hereinabove set forth, the plaintiff's body was severely bruised and his entire nervous system deeply and permanently shocked; that his skull was badly fractured and the nerves and other vital tissue of his brain severely and permanently injured; that as a result of said injuries, the plaintiff has incurred substantial medical expenses, has suffered a loss of earning capacity, and loss of the normal use of his faculties, and [fol. 6] has endured long and severe pain and suffering.

8. That by reason of the matters hereinabove set forth, the plaintiff is entitled to recover of the defendant the sum of $25,000.00.

9. That the plaintiff is entitled to maintain this action against the defendant by virtue of the provisions of the

"Federal Tort Claims Act," the same being Title IV of the Legislative Reorganization Act of 1946, enacted by the Congress of the United States.

Wherefore, the plaintiff prays that he have and recover judgment of the defendant in the sum of $25,000.00, together with the costs herein.

W. S. Blakeney, Guthrie, Pierce & Blakeney, Johnston Building, Charlotte, North Carolina, Attorneys for the Plaintiff.

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IN UNITED STATES DISTRICT COURT

ANSWER (WELKER B. BROOKS CASE)

The Defendant, answering the complaint of the Plaintiff, says:

1. That Paragraph One of plaintiff's complaint is not denied.

2. In answering Paragraph Two of plaintiff's complaint, it is admitted that plaintiff was an occupant of the automobile driven by Arthur L. Brooks on February 17, 1945. Defendant does not have sufficient information as to the position of the other occupants of said automobile, and the remaining portion of said paragraph is therefore denied.

3. In answering Paragraph Three of plaintiff's complaint, defendant does not have sufficient information as to the truth of the matters alleged therein, and therefore denies same.

[fol. 7] 4. In answering Paragraph Four of plaintiff's complaint, defendant admits that plaintiff's automobile stopped before entering highway No. 87. The remaining allegations are untrue and therefore denied.

5. In answering Paragraph Five of plaintiff's complaint, it is admitted that the truck was the property of the defendant and was being operated by a civilian employee. The remaining portion of said paragraph is denied.

6. Paragraph Six of plaintiff's complaint is untrue and is therefore denied.

7. In answering Paragraph Seven of plaintiff's complaint, the defendant has no knowledge of the extent of plaintiff's injury, but expressly denies that defendant by any act on its part or on the part of its employee or driver in anywise caused or contributed to said injury.

8. Paragraph Eight of plaintiff's complaint is untrue and is therefore denied.

9. In answering Paragraph Nine of plaintiff's complaint, it is admitted that certain actions may be instituted under the Federal Tort Claim Act.

## Further Defense

1. That the defendant was at no time guilty of negligence, carelessness, wrongful or unlawful conduct upon the occasion hereinabove mentioned as its vehicle was proceeding on highway No. 87 on the right-hand side of the road in a one-way lane in a careful, cautious, and prudent manner on a highway clear of traffic with the exception of plaintiff's automobile which had stopped at said intersection and was apparently waiting for defendant's vehicle to pass. That the injury sustained by plaintiff as a result of said collision [fol. 8] arose solely and exclusively from and was proximately caused and produced by the negligent, careless, reckless, wrongful, and unlawful acts and conduct of plaintiff, and the driver in whose car he was a passenger, the negligence of said driver being therefore imputed to the plaintiff herein.

2. That without waiving any of the foregoing defenses, but specifically relying upon same, the defendant avers that even if it was guilty of negligence, wrongful or unlawful conduct upon the occasion of said accident, all of which is expressly denied, the negligent, wrongful and unlawful acts and conduct of the plaintiff was:

(a) That the vehicle in which plaintiff was driving or riding as a passenger, after making a complete stop at a stop signal posted at the intersection of the Old Fort Bragg road as it entered highway No. 87, failed to observe the condition of traffic passing over highway No. 87, which was then and is now an arterial highway, and without warning, the driver of said vehicle suddenly moved said vehicle from a completely stopped position directly into the path of

defendant's vehicle causing said vehicle to crash into the automobile which plaintiff was driving or riding in as a passenger.

(b) The vehicle in which plaintiff was driving or riding in as a passenger was being operated in such a manner and in a wilful and wanton disregard of the rights and safety of others and without due caution and circumspection and in a manner so as to endanger or likely to endanger persons or property upon said highway.

That said acts constituted contributory negligence upon the part of the plaintiff and that said wrongful, negligent and unlawful acts and conduct are hereby expressly pleaded as contributory negligence and a bar to any recovery by the plaintiff herein.

[fol. 9] Wherefore, having fully answered the complaint of the plaintiff, the defendant prays:

1. That the plaintiff have and recover nothing of the defendant in this action, and that said action be dismissed.

2. That the plaintiff be taxed with the costs, and have such other and further relief as the defendant may be lawfully entitled.

David E. Henderson, United States Attorney. W. M. Nicholson, Assistant United States Attorney.

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IN UNITED STATES DISTRICT COURT

FURTHER ANSWER AND DEFENSE (WELKER B. BROOKS CASE)

After leave of the Court first had and obtained, the defendant, the United States of America, files this amended answer and further defense.

1. That at the time the plaintiff, Welker B. Brooks, claims to have been injured on the 17th day of February, 1945, he was in the military service of the United States of America located at Fort Bragg, North Carolina.

2. That the plaintiff Welker B. Brooks made application to the Veterans' Administration, acting on behalf of the United States of America, for compensation and was

awarded compensation in the amount of $23.00 per month for a disability from April 1, 1946 to August 31, 1946, and $27.60 per month from September 1, 1946, to continue as long as he remains disabled.

3. That the defendant United States of America has been paying to the plaintiff Welker B. Brooks the sums set out in the award referred to and the said plaintiff has been accepting the same.

[fol. 10] 4. That under the award made as hereinbefore set out, which has been accepted by the plaintiff, the plaintiff is barred from further recovery from the defendant in this action, and the acceptance of said award is hereby pleaded in bar of recovery in this action.

Wherefore, the defendant prays the Court that this action be dismissed and for such other and further relief as the defendant may be entitled to.

David E. Henderson, United States Attorney, Attorney for defendant, The United States of America.

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In United States District Court

Findings and Conclusions of Law (Welker B. Brooks Case)

This cause coming on for trial, and trial of the same having been completed, the Court upon all of the evidence and under the law applicable thereto makes the following findings and conclusions with respect to the matters which are here in controversy:

That upon arriving at the highway intersection which is involved in this case and before entering the same, Arthur L. Brooks, the driver of the automobile in which the plaintiff was riding, brought the said automobile to a full stop, and then, it reasonably appearing under all the circumstances that he could do so in safety, he drove the said automobile into the said intersection in a reasonably prudent manner and had passed approximately two-thirds of the distance through the said intersection when the said automobile was struck on its left side with great force by the defendant's truck, driven by the defendant's employee;

[fol. 11] That the defendant's truck entered the aforesaid intersection after the automobile in which the plaintiff was riding had already entered the same; that the driver of the defendant's truck, under the circumstances then and there existing as he drove into and traversed the intersection and until the said truck collided with the aforesaid automobile, was operating the said truck at an imprudent rate of speed and without sufficiently checking the speed of the said truck and without exercising sufficient care and caution in guiding and controlling the said truck, caused and permitted the same to strike the automobile in which the plaintiff was riding;

That the driver of the defendant's truck, moreover imprudently swerved the truck to his left as he drove into and traversed the aforesaid intersection, thereby causing the truck to collide with the aforesaid automobile, whereas, on the other hand, the driver of the said truck could have continued straight ahead or swerved in reasonable safety to his right, and thereby avoided the aforesaid collision.

That the personal injuries which the plaintiff sustained in the collision of the aforesaid truck and automobile were proximately caused by negligence on the part of the driver of the defendant's truck and not by negligence on the part of the plaintiff;

That the plaintiff is reasonably entitled to damages from the defendant in the amount of Four Thousand ($4,000.00) Dollars, on account of his said personal injuries.

Charles C. Cavanah, Judge Presiding over October 1947 Term of the United States District Court for the Western District of North Carolina at Charlotte.

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[fol. 12] IN UNITED STATES DISTRICT COURT

JUDGMENT (WELKER B. BROOKS CASE)

This cause coming on for trial, and having been tried, and the Court having made findings and conclusions as appear of record in favor of the plaintiff;

Now, therefore, it is hereby ordered, adjudged and decreed that the plaintiff have and recover of the defendant

the sum of Four Thousand ($4,000.00) Dollars, together with the costs of this action.

This the 8th day of November 1947.

Charles C. Cavanah, Judge Presiding over October, 1947, Term of the United States District Court for the Western District of North Carolina at Charlotte.

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IN UNITED STATES DISTRICT COURT

JUDGMENT ON MOTION TO DISMISS (WELKER B. BROOKS CASE)

This cause coming on to be heard and being heard before the undersigned District Judge, commissioned to hold a Special Term of Civil Court for the Western District of North Carolina, at Charlotte, during October and November 1947;

And it appearing to the Court that the defendant United States of America has filed a motion to dismiss in instant case on the grounds that the District Court lacked jurisdiction in suits brought under the Federal Tort Claims Act on claims of injury or death to a member of the military personnel;

And it further appearing to the Court that the instant case is a suit brought by a member of the military personnel for injuries received while in the line of duty and in the armed services of the United States;

[fol. 13] Therefore, the Court is of the opinion that the Federal Tort Claims Act does not cover suits of this nature, and that this suit should be dismissed for want of jurisdiction, and the Court having granted said motion;

It is, therefore, ordered, adjudged and decreed, that this action be, and it is hereby, dismissed, and the judgment entered on the 8th day of November 1947 is hereby set aside and declared void for the reason assigned in the defendant's motion.

The Clerk will enter this judgment.

This — day of January 1948.

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The motion is denied. Exception allowed. January 7, 1948.

Charles C. Cavanah, United States District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION

JAMES M. BROOKS, Administrator of the Estate of ARTHUR L. BROOKS, Deceased, Plaintiff,

v.

THE UNITED STATES OF AMERICA, Defendant

COMPLAINT

The plaintiff, complaining of the defendant, says and alleges:

1. That the plaintiff is a resident of Mecklenburg County, North Carolina, and is the duly appointed, qualified and acting administrator of the estate of Arthur L. Brooks, de- [fol. 14] ceased—the plaintiff having been appointed as such administrator by the Clerk of the Superior Court of Mecklenburg County, North Carolina, and having qualified as such administrator before the said Clerk of the Superior Court of Mecklenburg County, North Carolina.

2. That on or about February 17, 1945, the plaintiff's intestate, Arthur L. Brooks, who was a son of the plaintiff, was a member of the United States Military Forces and was located at Fort Bragg, North Carolina; that on the evening of said date the plaintiff's intestate, together with the plaintiff and another son of the plaintiff, Welker B. Brooks, were riding in a two-seated Chevrolet Sedan belonging to the plaintiff's intestate; that on said occasion the plaintiff's intestate was driving his said automobile, the plaintiff sitting in the front seat of said automobile beside his said son, the plaintiff's intestate, and the plaintiff's other son, Welker B. Brooks, sitting alone in the back seat of said automobile.

3. That at about eight o'clock P. M., after dark on the evening of the aforementioned date, the plaintiff and his said two sons were traveling in the aforesaid automobile on a payed highway from Fayetteville, North Carolina, to Fort Bragg, North Carolina; that while thus proceeding, they approached a point where said highway intersects another payed highway; that on said occasion it was the purpose of the occupants of said automobile to enter onto the said second highway and proceed thereon the remaining distance to Fort Bragg, but that in order to do so, it was first

necessary for them to cross over half of said second highway in order to get upon the farther lane thereof, on which traffic moved in the direction of Fort Bragg.

4. That upon arriving at the said second highway and before entering thereon, the plaintiff's intestate brought the [fol. 15] aforesaid automobile to a complete stop; that it appearing that no vehicle was approaching, the plaintiff's intestate started his said automobile across the nearer lane of the said highway in order to get upon the farther lane thereof, as hereinabove set forth; that his said automobile had almost cleared the said lane which it was crossing when suddenly it was struck on its left side with terrific force by a motor vehicle traveling, as the plaintiff is informed and believes, without any lights, at a very rapid, excessive and unlawful rate of speed; and that as a result of said motor vehicle striking the said Chevrolet automobile which the plaintiff's intestate was driving, he, the plaintiff's intestate, Arthur L. Brooks, was instantly killed, and his said automobile completely demolished.

5. That, as the plaintiff is informed and believes, the motor vehicle which struck the aforesaid Chevrolet automobile was a large motortruck belonging to the United States Army and operated for and in behalf of the United States Army through its authorities at the Military Post of Fort Bragg, North Carolina; that said motortruck, as the plaintiff is informed and believes, was being operated and driven on the occasion herein referred to by a civilian employee of the defendant, who, as the plaintiff is informed and believes, was operating and driving the said motortruck on the said occasion within the scope of his employment.

6. That the said employee of the defendant was operating and driving the said motortruck on the said occasion in a careless and negligent manner in that he was operating and driving the same at an excessive and unlawful rate of speed, in the dark without any lights thereon, without reasonable and proper attention and regard under the circumstances for the rights of persons in the position of the [fol. 16] plaintiff's intestate, without reasonable and proper warning under the circumstances to persons in the position of the plaintiff's intestate, and without reasonable and proper control of said motortruck, under all the then and

there existing circumstances; that such negligence on the part of the defendant's employee was the direct and proximate cause of the death of the plaintiff's intestate and the damage to the property of the plaintiff's intestate, hereinabove referred to.

7. That immediately before it was struck by the aforesaid motor truck, the reasonable market value of the aforesaid Chevrolet automobile belonging to the plaintiff's intestate was $450.00; that immediately after it was struck by the said motor truck, the reasonable market value of the aforesaid Chevrolet automobile was $25.00.

8. That by reason of the matters hereinabove set forth, that is, the aforesaid damage to the property of the plaintiff's intestate, and the death of the plaintiff's infestate, under the circumstances hereinabove set forth, and expenses necessarily incurred by the plaintiff as a result of the death of the plaintiff's intestate, the plaintiff, as administrator of the estate of the said Arthur L. Brooks, deceased, is entitled to recover of the defendant the sum of $50,425.00.

9. That the plaintiff is entitled to maintain this action against the defendant by virtue of the provisions of the "Federal Tort Claims Act," the same being Title IV of the Legislative Reorganization Act of 1946, enacted by the Congress of the United States.

Wherefore, the plaintiff prays that he have and recover judgment of the defendant in the sum of $50,425.00, together with the costs herein.

W. C. Blakeney, Guthrie, Pierce & Blakeney; Attorneys for the Plaintiff.

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[fol. 17] IN UNITED STATES DISTRICT COURT

ANSWER (JAMES M. BROOKS, ADMINISTRATOR CASE)

The Defendant, answering the complaint of the plaintiff, says:

1. That Paragraph One of plaintiff's complaint is not denied.

2. In answering Paragraph Two of plaintiff's complaint, it is admitted that Arthur L. Brooks was the driver of said

automobile on February 17, 1945. Defendant does not have sufficient information as to the position of the other occupants of said automobile, and the remaining portion of said paragraph is therefore denied.

3. In answering Paragraph Three of plaintiff's complaint, defendant does not have sufficient information as to the truth of the matters alleged therein, and therefore denies same.

4. In answering Paragraph Four of plaintiff's complaint, defendant admits that plaintiff's automobile stopped before entering highway No. 87. The remaining allegations are untrue and therefore denied.

5. In answering Paragraph Five of plaintiff's complaint, it is admitted that the truck was the property of the defendant and was being operated by a civilian employee. The remaining portion of said paragraph is denied.

6. Paragraph Six of plaintiff's complaint is untrue and is therefore denied.

7. In answering Paragraph Seven of plaintiff's complaint, the defendant has no knowledge of the extent of plaintiff's injury, but expressly denies that defendant by any act on its part or on the part of its employee or driver in anywise caused or contributed to said injury.

[fol. 18] 8. Paragraph Eight of plaintiff's complaint is untrue and is therefore denied.

9. In answering Paragraph Nine of plaintiff's complaint, it is admitted that certain actions may be instituted under the Federal Tort Claims Act.

Further Defense

1. That the defendant was at no time guilty of negligence, carelessness, wrongful or unlawful conduct upon the occasion hereinabove mentioned as its vehicle was proceeding on highway No. 87 on the right-hand side of the road in a one-way traffic lane in a careful, cautious and prudent manner on a highway clear of traffic with the exception of plaintiff's automobile which had stopped at said intersection and was apparently waiting for defendant's vehicle to pass. That the injury sustained by plaintiff as a result of said collision arose solely and exclusively from and was proximately

caused and produced by the negligent, careless, reckless, wrongful, and unlawful acts and conduct of plaintiff.

2. That without waiving any of the foregoing defenses, but specifically relying upon same, the defendant avers that even if it was guilty of negligence, wrongful, or unlawful conduct upon the occasion of said accident, all of which is expressly denied, the negligent, wrongful, and unlawful acts and conduct of the plaintiff was:

(a) That the vehicle in which plaintiff was driving after making a complete stop at a stop signal posted at the intersection of the Old Fort Bragg road as it entered highway No. 87 failed to observe the condition of traffic passing over highway No. 87 which was then and is now an arterial highway, and without warning, the driver of said vehicle [fol. 19] suddenly moved said vehicle from a completely stopped position directly into the path of defendant's vehicle causing said vehicle to crash into the automobile which plaintiff was driving.

(b) The vehicle in which plaintiff was driving was being operated in such a manner and in a wilful and wanton disregard of the rights and safety of others and without due caution and circumspection and in a manner so as to endanger or likely to endanger persons or property upon said highway.

That said acts constituted contributory negligence upon the part of the plaintiff and that said wrongful, negligent, and unlawful acts and conduct are hereby expressly pleaded as contributory negligence and a bar to any recovery by the plaintiff herein.

Wherefore, having fully answered the complaint of the plaintiff, the defendant prays:

1. That the plaintiff have and recover nothing of the defendant in this action, and that said action be dismissed.

2. That the plaintiff be taxed with the costs and have such other and further relief as the defendant may be lawfully entitled.

David E. Tenderson, United States Attorney. W. Nicholson, Assistant United States Attorney.

## In United States District Court

### Further Answer and Defense (James M. Brooks, Administrator Case)

After leave of the Court first had and obtained, the defendant, the United States of America, files this amended answer and further defense.

[fol. 20] 1. At the time of the death of Arthur L. Brooks, he was in the military service of the United States of America located at Fort Bragg, N. C.

2. That the defendant has paid to Maggie H. Brooks, decedent's mother, the sum of $468.00, being the payment of the 6 months' gratuity pay as provided for in cases of the death of persons in military service in like cases, which sum has been accepted.

3. That if the plaintiff should recover anything in this action, the defendant alleges that the $468.00 paid should be considered in diminution of any damages in this action.

4. That the defendant denies that the defendant (plaintiff) is entitled to recover anything in this action, and that the United States of America is not indebted in any sum.

Wherefore, the defendant prays judgment that this action be dismissed, but if the plaintiff should recover any damages, that the sum of $468.00 should be credited in diminution of such damages, and for such other and further relief as the defendant may be entitled to.

David E. Henderson, United States Attorney, Attorney for defendant, United States of America.

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## In United States District Court

### Findings and Conclusions of Law (James M. Brooks, Administrator, Case)

This cause coming on for trial and trial of the same having been completed, the Court upon all of the evidence, and under the law applicable thereto makes the following findings and conclusions with respect to the matters which are here in controversy.

[fol. 21] That upon arriving at the highway intersection which is involved in this case and before entering the same, the plaintiff's intestate, Arthur L. Brooks, brought the automobile which he was driving to a full stop, and then, it reasonably appearing under all the circumstances that he could do so in safety, he drove the said automobile into the said intersection in a reasonably prudent manner and had passed approximately two-thirds of the distance through the said intersection when the said automobile was struck on its left side with great force by the defendant's truck, driven by the defendant's employee;

That the defendant's truck entered the aforesaid intersection after the automobile of the plaintiff's intestate had already entered the same; that the driver of the defendant's truck, under the circumstances then and there existing as he drove into and traversed the intersection and until the said truck collided with the aforesaid automobile, was operating the said truck at an imprudent rate of speed and without sufficiently checking the speed of the said truck and without exercising sufficient care and caution in guiding and controlling the said truck, caused and permitted the same to strike the automobile of the plaintiff's intestate;

That the driver of the defendant's truck, moreover, imprudently swerved the truck to his left as he drove into and traversed the aforesaid intersection, thereby causing the truck to collide with the aforesaid automobile, whereas, on the other hand, the driver of the said truck could have continued straight ahead or swerved in reasonable safety to his right and thereby have avoided the aforesaid collision;

That the death of the plaintiff's intestate was thus proximately caused by the negligence on the part of the driver of the defendant's truck and not by negligence or contributory-
[fol. 22] negligence on the part of the plaintiff's intestate.

That the plaintiff is reasonably entitled to damages from the defendant in the amount of Twenty-Five Thousand ($25,000.00) Dollars for the wrongful death of the plaintiff's intestate, and in the amount of Four Hundred Twenty-Five ($425.00) Dollars for damage to the plaintiff's automobile.

Charles C. Cavanah, Judge Presiding over October 1947 Term of the United States District Court for the Western District of North Carolina at Charlotte.

IN UNITED STATES DISTRICT COURT

JUDGMENT (JAMES M. BROOKS, ADMINISTRATOR, CASE)

This cause coming on for trial and having been tried, and the Court having made findings and conclusions as appear of record in favor of the plaintiff;

Now, therefore, it is hereby ordered, adjudged and decreed that the plaintiff have and recover of the defendant the sum of Twenty-Five Thousand Four Hundred Twenty-five ($25,425.00) Dollars, together with the costs of this action.

This the 8th day of November 1947.

Charles C. Cavanah, Judge Presiding over October 1947 Term of the United States District Court for the Western District of North Carolina at Charlotte.

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[fol. 23] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS (JAMES M. BROOKS, ADMINISTRATOR, CASE)[18]—Filed November 18, 1947

Comes now the United States of America, defendant in the above-entitled action, through its attorney David E. Henderson, United States Attorney for the Western District of North Carolina, and moves the Court as follows:

1. To set aside the judgment signed and entered in the above entitled action on November 8, 1947 at Charlotte, North Carolina, and to dismiss said suit for the reason that the Court lacks jurisdiction in suits of this nature brought under the Federal Tort Claims Act on claims of injury or death to a member of the military personnel.

David E. Henderson, United States Attorney, Attorney for Defendant.

NOTICE OF MOTION

To Whiteford S. Blakeney, Attorney for Plaintiff James M. Brooks, Administrator of the Estate of Arthur L. Brooks, deceased:

Please take notice that the undersigned will bring the above motion on for hearing before Honorable Charles C.

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[18] An identical Motion To Dismiss was filed on November 18, 1947 in the *Welker B. Brooks* case.

Cavanah at the courtroom of the United States District Court in the Post Office Building, Raleigh, North Carolina, [fol. 24] on the 25th day of November, 1947, at 10 o'clock A. M., or as soon thereafter as counsel can be heard.

David E. Henderson, United States Attorney, Attorney for Defendant, 252 Post Office Building, Charlotte, North Carolina.

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[fol. 25] IN UNITED STATES DISTRICT COURT

JUDGMENT ON MOTION TO DISMISS (JAMES M. BROOKS, ADMINISTRATOR, CASE)

This cause coming on to be heard and being heard before the undersigned District Judge, commissioned to hold a Special Term of Civil Court for the Western District of North Carolina, at Charlotte, during October and November 1947;

And it appearing to the Court that the defendant United States of America has filed a motion to dismiss in instant case on the grounds that the District Court lacked jurisdiction in suits brought under the Federal Tort Claims Act on claims of injury or death to a member of the military personnel;

And it further appearing to the Court that instant case was brought by the Administrator of the Estate of a deceased soldier for damages due to death of the soldier, a member of the military personnel;

Therefore, the Court is of the opinion that the Federal Tort Claims Act does not cover suits of this nature, and that this suit should be dismissed for want of jurisdiction, and the Court having granted said motion;

It is, therefore, ordered, adjudged and decreed that this action be, and it is hereby dismissed and the judgment entered on the 8th day of November, 1947, is hereby set aside and declared void for the reason assigned in the defendant's motion.

The Clerk will enter this Judgment.

This — day of January 1948.

Charles C. Cavanah, U. S. District Judge.

The Motion is denied, exception allowed. Jan. 7th, 1948.

(S.) Charles C. Cavanah, United States District Judge.

[fol. 26] IN UNITED STATES DISTRICT COURT

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

Testimony of WELKER B. BROOKS

* * * * * * * *

Q. When did you come to?

A. Well, I don't know exactly how long I was knocked unconscious, but it was in the hospital.

Q. Where?

A. Fort Bragg.

Q. How long did you stay there in the hospital, Mr. Brooks?

A. From February 17th to May 7th.

Q. What treatment did they give you there?

A. They re-set my jaw, my cheekbone.

Mr. Henderson: I'd like to preserve our objections and exceptions on the Motion we have made, at the conclusion, of the evidence, that whatever his condition was has been taken care of.

The Court: We will take this testimony and then hear you on it.

Q. What did they do to you there in the hospital?

A. They re-set my cheekbone that was shattered and gave me thirty days' check.

Q. After thirty days they did what?

A. Took a blood clot out of my ear.

Q. Where were you injured, what part of your body?

A. My left cheekbone, my head.

Q. To what extent was it injured?

A. It was shattered up.

Q. The upper jaw bone or lower?

A. Upper.

Q. And the left cheekbone?

A. Yes, sir.

Q. Did they operate on you?

A. Yes, sir.

Q. Who did that?

A. Major Shoemaker and Captain Winegass.

[fol. 27] Q. When they let you out of Fort Bragg hospital, where did you go?

A. Back to duty in California.

. . . . . .

Cross examination.

By Mr. Henderson:

Q. Mr. Brooks, when were you discharged from military service.

A. December 14, 1945.

Q. And when did you make application to the Veterans' Administration for compensation?

A. I believe it was either January or February.

Q. Of what year?

A. 1946.

Q. That application was made for compensation because of injuries that you claim to have received on February 17, 1945?

A. Yes, sir.

Q. And you had a hearing before the Veterans' Administration?

A. Yes, sir.

Q. And you were examined by their doctors?

A. Yes.

Q. And award was made as compensation in which—they first made an award of $20.00 per month?

A. $23.00 I believe it was.

Q. And the government paid you $23.00 a month for a short period of time?

A. Yes, sir.

Q. And then, under the regulations, you were entitled to an increase in that amount and so they allowed you then $26.70 a month?

A. $27.60 a month.

Q. How long have you been drawing that $27.60 a month?

A. I believe it was along about May.

[fol. 28] Q. May, 1946?

A. Yes.

Q. So you have drawn the $27.60 since that time.

A. Yes, sir.

Q. And you are drawing that every month now?

A. Yes, sir.

Q. Of course, you understand that if your condition gets better, it gets less, and if your condition gets worse from that accident that you had, you get more?

A. Yes, sir.

Q. Was any other compensation paid you beside what is being paid by the Veterans' Administration?

A. No, sir.

Q. The Government took care of all the doctor bills?

A. Yes.

Q. And the hospital bill?

A. Yes.

. . . . . .

Testimony of R. G. Byers

. . . . . .

Q. Where were you living and what were you doing about February 17, 1945?

A. I was living at Fort Bragg, North Carolina, and on February 19, 1945, I was appointed to investigate the circumstances under which Staff Sergeant Arthur L. Brooks met his death.

. . . . . .

Q. Are you acquainted with the payment of this gratuity pay, six months' gratuity pay?

A. Well, I know that if a soldier dies or is killed in line of duty in the service that six months' gratuity pay is given to the beneficiary.

Q. Is that a part of the extended salary pay?

[fol. 29] A. Yes, that is a payment of six months' further monthly salary, what it will amount to.

Q. That is what the government paid in this case?

A. Yes, that was the purpose of my investigation—to determine whether or not this soldier was killed in the line of duty or whether or not that benefit would be paid, depending upon the result of my investigation.

. . . . . .

In United States District Court

No. 547

James M. Brooks, Administrator of the Estate of Arthur L. Brooks, Deceased, Plaintiff,

v.

The United States of America, Defendant

No. 545

Welker B. Brooks, Plaintiff,

v.

The United States of America, Defendant

No. 546

James M. Brooks, Plaintiff,

v.

The United States of America, Defendant

Opinion

Cavanah, District Judge:

These cases were consolidated and tried together as they all arise out of the same alleged accident involving a collision of a Chevrolet automobile belonging to and driven by Arthur L. Brooks, now deceased, and an Army [fol. 30] truck, belonging to the United States and driven by a civilian employee of the United States about the hour of eight o'clock P. M. at the intersection of highway No. 87 and the old Fort Bragg road in North Carolina.

The principal issue of fact is one of negligence as to whether the defendant was negligent in the operation of the Army truck at the time of the accident and was the proximate cause of the injuries and damages to the plaintiffs, or whether the collision was caused by the negligence of the plaintiffs.

It appears that Arthur L. Brooks who was in the military service of the United States and was driving the Chevrolet automobile, was instantly killed and his automobile demolished. Riding with him in his automobile

were his father and Welker B. Brooks, a brother, who received the injuries complained of. It was dark and the weather rainy, and the plaintiff James L. Brooks and his two sons were traveling on a paved highway from Fayetteville to Fort Bragg, North Carolina, and while thus proceeding they approached a point where the two highways intersect and before entering upon highway No. 87 Arthur L. Brooks brought his automobile at a complete stop and it not appearing to him or the other two occupants then in his automobile that a vehicle was approaching, he started his automobile across the nearer lane of the highway in order to get upon the farther lane and before he cleared the lane upon which he was traveling his automobile was suddenly struck with force on its left side by the Army truck then driven by the civilian employee of the defendant and knocked upon the grass space in the center of the highway. To determine this issue of fact of negligence it becomes first necessary to consider the pertinent provisions of the North Carolina Motor Vehicle Laws requiring of one operating a vehicle upon [fol. 31] a highway to decrease the speed of his automobile lower than the limits allowed when in approaching an intersection of highways as may be necessary to avoid colliding with any vehicle or person on or entering the highway and may not drive at a speed that is not necessary, reasonable, and prudent under the circumstances, notwithstanding the speed is less than that fixed, and must use due care at all times, sec. 20-141 of laws of North Carolina; *Kolman* v. *Silbert*, 119 N. C. 134, and when two vehicles approach or enter an intersection at approximately or at the same time the driver of the vehicle on the left shall yield the right of way to the driver on the right, sec. 20-155.

The physical facts of the situation near and at the intersection of the highways and the oral testimony of the witnesses present a clear picture of the positions of the parties immediately before and at the time of the collision, as it appears that the plaintiffs were operating the Chevrolet automobile with lights on and brought it to a complete stop at or near the point where a stop sign was at before entering upon the intersection and that the operator of the Army truck could have observed it at a reasonable distance from the intersection and before the plaintiffs' automobile entered upon the intersection. His vision to the right was not obstructed, as the country was flat. The inter-

section was of sufficient length and width for both plaintiffs' automobile and the Army truck to have cleared one another if operated in a proper manner, with caution, reasonable speed, and lookout. The plaintiffs' automobile was about two-thirds in the intersection when it was struck, and if the Army truck was either stopped or traveling at a reasonable speed from the time the operator first saw it until the collision, ample opportunity was given to him to have [fol. 32] avoided the collision by reducing the speed he was going so he could have had his truck under immediate control when he had arrived at the intersection, but did not do so, and recklessly entered the intersection when it was dark and raining. The Army truck swayed to the left on the intersection when it struck plaintiffs' automobile, striking it with great force, instead of swaying to the right or continuing in a straight line avoiding the collision, as it did not have the right of way and took the last clear chance when doing so. It did not enter the intersection carefully or act prudently, thereby violating the laws of North Carolina which under all of the evidence constituted negligence on its part entitling the plaintiffs to a recovery.

The contention asserted by the defendant in the case of Welker B. Brooks that he is and has been receiving monthly compensation from the Veterans' Administration since the accident is a bar in this action, as he has adopted that course and his sole remedy for further compensation is before that board and cannot adopt two courses, otherwise he would be receiving from the Government double compensation for his injuries, pain, suffering, and medical expenses paid by the Government.

Approaching this question, we are confronted first, with two Federal Acts which apply to the present action, Title 28, U. S. C. A. sec. 931, and Title 38, U. S. C. A., sec. 471 et seq., one relating to liability of the United States and one relating to receiving disability payments from the United States Veterans' Administration. There is not as yet any specific authority on the question. The inquiry is then ought the plaintiff be entirely barred from suit for damages by disability payments which do not include all of the elements of damages which are involved in the suit? The [fol. 33] present action includes account of plaintiffs' injuries which are not included in the disability payments which he is now receiving. Should the Veterans' Administration cease to make payments to the plaintiff he could not

then have recourse to his present action for damages because the same would be barred by the statute of limitations expressed in the Federal Tort Claims Act. There does not appear any provision in the Federal Act allowing disability payments making them exclusive as is the Workmen's Compensation statute of North Carolina. The thought is expressed in the case of *Standard Oil Co.* v. *United States*, 153 Federal 2d 958, seems to be somewhat analogous, where it was held that a soldier who is tortiously injured and receiving medical care and hospitalization from the United States Government and at the same time collect damages from a third party tort-feasor, there is no subrogation on the part of the government to the soldier's rights against the third party tort-feasor. As the Federal Tort Claims Act makes the government just as liable as a private tort-feasor would be, it would follow that the government may make veterans' payments to the plaintiff and at the same time be liable to him as a tort-feasor.

It will be observed that the language contained in section 931 of the Federal Tort Claims Act stating that the United States shall be liable under like circumstances and in the same manner and extent as a private individual, means the manner and extent of the accident, and does not refer to questions of receiving disability payments.

Reasoning then that the Federal Acts apply and control, the thought urged by the defendant that the state Workmen's Compensation statute and decisions cited controls would not be analogous, for after all if the action is gov- [fols. 34-38] erned by a Federal Act, a statute or decision rendered before the enactment of the Federal Acts would not apply or control.

The further contention of defendant that the six months salary of the deceased Brooks paid to his mother should be deducted from the amount allowed to his estate, is not tenable under the Federal Regulations, for that is a definite and separate amount allowed by the regulations.

So, from the conclusion thus reached the amounts of damages to be allowed in the three actions against the defendants are:

*First*—That in case of James M. Brooks, Administrator of the estate of Arthur L. Brooks, deceased, the deceased being a young man at the time of the accident of the age of thirty-two with a life expectancy of a large number of years,

the court finds that the sum of $25,000 is a reasonable amount as damages to be allowed his estate, and the further sum of $425.00 as damages the value of his automobile which was demolished.

*Second*—That in the case of James M. Brooks, he having received an injury to his left hand and other slight injuries, the sum of $5,000.00 is a reasonable amount as damages to be allowed to him.

*Third*—That in the case of Welker B. Brooks, for an injury to his face and head, which do not appear to be permanent, although he has suffered pain and suffering, the sum of $4,000.00 is a reasonable amount to be allowed to him.

In each of the cases the plaintiffs are entitled to their costs.

Findings and decree will be prepared by counsel for the plaintiffs and presented to the Court.

[fol. 39] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 5758

UNITED STATES OF AMERICA, Appellant,

versus

WELKER B. BROOKS, Appellee

Appeal from the District Court of the United States for the Western District of North Carolina, at Charlotte

May 25, 1948, the transcript of record is filed and the cause docketed.

May 27, 1948, two orders extending the time to and including May 28, 1948, for filing record on appeal and docketing action are filed.

May 28, 1948, the appearance of W. S. Blakeney is entered for the appellee.

June 1, 1948, the appearance of David E. Henderson, United States Attorney, is entered for the appellant.

June 8, 1948, brief and appendix on behalf of the appellant are filed.

June 15, 1948, the appearance of Paul A. Sweeney is entered for the appellant.

June 24, 1948, consent of appellant to extension of time to file appellee's brief is filed.

July 1, 1948, brief on behalf of the appellee is [fol. 40] filed.

ARGUMENT OF CAUSE

July 5, 1948, (June term, 1948) cause came on to be heard, together with No. 5759, before Parker and Dobie, Circuit Judges, and Watkins, District Judge, and was argued by counsel and submitted.

[fol. 41] Opinion— Filed August 26, 1948

United States Circuit Court of Appeals, Fourth Circuit

No. 5758

United States of America, Appellant,

versus

Welker B. Brooks, Appellee

No. 5759

United States of America, Appellant,

versus

James M. Brooks, Administrator of the Estate of Arthur L. Brooks, Deceased, Appellee

Appeals from the District Court of the United States for the Western District of North Carolina, at Charlotte

[fol. 42] (Argued July 5, 1948. Decided August 26, 1948)

Before Parker and Dobie, Circuit Judges, and Watkins, District Judge

Paul A. Sweeney, Attorney, Department of Justice, (Newell A. Clapp, Acting Assistant Attorney General; David E. Henderson, U. S. Attorney, and Morton Hollander, Attorney, Department of Justice, on brief) for Appellant; and Whiteford S. Blakeney (Guthrie, Pierce & Blakeney on brief) for Appellees.

Dobie, Circuit Judge:

Welker Brooks and James Brooks, as Administrator of the Estate of Arthur Brooks, deceased, filed civil actions in the United States District Court for the Western District of North Carolina, against the United States under the Federal Tort Claims Act, 28 U.S.C.A. § 921 et seq. The District Judge, sitting without a jury, entered judgments against the United States in favor of Welker Brooks and James Brooks, Administrator of the Estate of Arthur Brooks. The case is before us on the appeal of the United States from these judgments.

About 8 P. M. on February 17, 1945, Welker Brooks and Arthur Brooks, both enlisted men in the United States Army, were driving with their father, a civilian, in their private automobile on a public highway near Fayetteville, [fol. 43] North Carolina. Both soldiers were on leave or furlough, engaged in their private concerns and not on any business connected with their military service. The Brooks automobile collided with an Army truck, operated by a civilian employee of the War Department, which was transporting the members of a Fort Bragg band to Fayetteville. Arthur Brooks was killed and Welker Brooks was seriously injured as a result of the collision, which the District Judge held to be due to the negligence of the driver of the Army truck.

The only question we are called upon to decide is whether Welker Brooks and James Brooks, as Administrator of the Estate of Arthur Brooks, deceased, have claims against the United States under the provisions of the Federal Tort Claims Act. We think the District Judge erred by answering this question in the affirmative.

This problem of statutory interpretation is close and difficult, due primarily to the inept draftsmanship on the part of Congress in failing to make clear and express provision as to soldiers in the United States Army.

It seems crystal clear that the claims here in suit fall literally within the comprehensive words "any claim against the United States, for money only" used in §410(a) of the Act, without any specific limitation as to the classes of persons who have valid claims under the Act. This fact, however, is not in itself determinative of our problem. The proper approach, we think, was admirably stated by District Judge Chesnut, in *Jefferson* v. *United States*, 77 F. Supp. 706, 711-712.

> "It is a familiar rule of statutory construction that the merely literal reading of particular words in an Act [fol. 44] can be narrowed by construction where, from the whole subject matter of the particular Act and its setting in the whole governmental scheme, the court can see that the literal import of the phrase used is contrary to established policy and would not accord with the real intention of Congress in passing the Act, and for this purpose we may look to the reason of the enactment and inquire into its antecedent history and give

> it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail.' *Takao Ozawa* v. *United States*, 260 U. S. 178, 43 S. Ct. 65, 67, 67 L. Ed. 199; *United States* v. *Sweet*, 245 U. S. 563, 38 S. Ct. 193, 62 L. Ed. 473; *United States* v. *Arizona*, 295 U. S. 174, 55 S. Ct. 666, 79 L. Ed. 1371."

Manifestly, the purpose of any important enactment of Congress is entitled to very great weight in determining the scope of the enactment. *Stonite Products Co.* v. *Melvin Lloyd Co.*, 315 U. S. 561. The purpose of the Legislative Reorganization Act of 1946, of which the Federal Tort Claims Act is Title IV, is said to be: "To provide for the increased efficiency in the legislative branch of the Government." Congress, for many years, had been plagued with a veritable flood of private bills authorizing the payment of money for personal injuries or property damage caused by the tortious conduct of employees of the United States. These bills consumed an appreciable portion of Congressional time and energy. And Congress, by its size and organization, was ill fitted to pass fairly upon these bills. §131 of the Legislative Reorganization Act of 1946 specifically forbids the introduction of such private bills for claims falling within the ambit of the Act.

While private bills for the relief of *civilians* were indeed [fol. 45] legion, exceedingly rare and very far between were such bills for the relief of men in the armed services. In this connection, we may note the following explanatory statement at page 31, Report No. 1400, on S. 2177 (79th Cong., 2d sess.), which became the Legislative Reorganization Act of 1946:

> "With the expansion of governmental activities in recent years, it becomes especially important to grant to *private* individuals the right to sue the Government in respect to such torts as negligence in the operation of vehicles." (Italics ours.)

The soldier, upon enlistment, acquires a special and unique military status, quite different from any relation between the Federal Government and civilians. *United States* v. *Standard Oil Co. of California*, 332 U. S. 301, 305; *In re Morrissey*, 137 U. S. 157, 159; *in re Grimley*, 137 U. S. 147. The soldier is subject to military discipline even while

at play, and his desertion is a serious crime, punishable at times by death. Rarely, if ever, is a soldier referred to by Congress as a "private individual."

Congress has established a complete and comprehensive administrative system of compensation to take care of the death of, or injuries to, servicemen. Monthly pension payments for disabling injuries, pensions to the widow, children or dependent parents for the death of a serviceman, full pay during periods of incapacity, medical attention and hospitalization, life insurance at rates far below the rates of commercial companies, employment preferences, education—all these and many other benefits, are distinctly given to servicemen. Nor have the States been niggardly to veterans. Certainly there is force in the suggestion that Congress [fol. 46] thought this system of benefits took adequate care of soldiers and intended thereby to exclude soldiers from the right to sue the United States for personal injuries received in the service.

In various statutes by which Congress has established this complete and comprehensive administrative system of compensation for damages resulting from the injury or death of a soldier, it has made no distinction between injuries received while a soldier was on furlough or leave, and injuries received while a soldier was on active duty. If the injury or disease is incurred during the period of his military service, it is service-connected, and is compensible, even though not service-caused. The fact that payments were made by the United States on account of the death of Arthur L. Brooks and the injuries of his brother Welker, shows the practice where the soldier is on leave.

In cognate Congressional statutes, wherein the United States has waived its traditional immunity from suit for tort claims, these statutes have been judicially interpreted as inapplicable to members of the armed services. Thus, the Public Vessels Act (46 U. S. C. A. §781 et seq.) authorized: "a libel in personam * * * against the United States * * * for damages caused by a public vessel of the United States * * *." Yet it was held that there was no claim against the United States for the death of naval officers. Speaking for a unanimous Court, Circuit Judge Swan, in *Dobson* v. *United States*, 27 F. (2d) 807, 808-809, cert. den. 278 U. S. 653, used this trenchant language:

"Verbally, there is nothing which excludes liability for damage to property or person of officers or crew * * *.

"Nevertheless, the construction contended for by [fol. 47] appellants involves so radical a departure from the government's long-standing policy with respect to the personnel of its naval forces that we cannot believe the Act should be given such a meaning. The statute itself does not specify who may maintain suits under it. To allow suit by the officers and crew of the public vessel for damage caused by it to them would be too great a reversal of policy to be enacted by such general terms. The Act of October 6, 1917 (40 Stat. 389) and 34 U. S. C. A. Sections 981, 982 directs the Paymaster General of the Navy to reimburse officers, enlisted men, and others in the naval service who suffer loss or destruction of or damage to their personal property in the naval service. * * *.

"Chapter 3, Title 38, United States Code (38 U. S. C. A. Sections 151-206), provides an elaborate pension system for personal injury and loss of life incurred by officers and enlisted men in the Navy. These pensions may be thought an inadequate substitute for the recovery of full damages under the Public Vessels Act of March 3, 1925, but they were well-known to all who entered the naval service. * * * If it had been the purpose to change that policy as respects officers and seamen of the Navy injured by the unseaworthiness of a public vessel, or by the fault of one another, because that is what in the end it comes to, we cannot think it would have been left to such general language as is to be found in the above quoted Section 1 * * *.

"We believe that Congress meant to leave upon the members of the naval forces the same risks of injuries suffered in the service of the United States as they had before."

In *Bradey* v. *United States*, 151 F. (2d) 742, 743, cert. den. 326 U. S. 795, rehearing denied 328 U. S. 880, Circuit Judge [fol. 48] Learned Hand stated:

"'It is quite true that nothing in the test of the Public Vessels Act bars suit by a member of the armed forces, but in *Dobson* v. *United States*, 2 Cir., 27 F. (2d) 807, cert. den. 278 U. S. 653, 49 S. Ct. 179, 73 L. Ed. 563, we

held that, because of the compensation elsewhere provided for such persons, they must be deemed excluded from its protection. That case directly rules here; and to succeed, the libellant must prevail upon us to overrule it. This she attempts to do on the ground that the course of judicial decision since then discloses a change of attitude towards such sufferers.

"We can find no evidence of such a change, nor do we see any antecedent reason to think that we were wrong before."

See, also, The West Point, 71 F. Supp. 206, 212.

In like manner, under the Railroad Control Act of 1918 (40 Stat. 451), when the Federal Government controlled the railroads, it was held that a soldier injured by the negligent operation of a railroad had no valid action against the United States. *Sandoval* v. *Davis*, 288 Fed. 56. See, also, *Dahn* v. *Davis*, 258 U. S. 421, 428.

Appellees make much of the fact that the Act contains certain specific exceptions to the liability of the United States. From this it is argued that these expressed exceptions negative any other implied exceptions. *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 377; *Cunard Steamship Co.* v. *Mellon*, 262 U. S. 100 218; *Lapina* v. *Williams*, 232 U. S. 78, 92. The maxim *expressio unius est exclusio alterius* is by no means a rule of statutory interpretation to be universally applied. Special stress is laid by appellees [fol. 49] on two of these express exceptions spelled out in the Act. Section 421(j) of the Act excepts: "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." See *Skeels* v. *United States*, 72 F. Supp. 372. Section 421(k) excepts claims "arising in a foreign country." This argument of appellees would have greater force if these two exceptions were set out in terms of *claimants*. But such is not the case. The first exception is couched solely in terms of the nature of the activity giving rise to the claim (combatant activities in war time) regardless of the claimant. And the second exception is stated purely in terms of place (whoever may make the claim), the *locus delicti*,—"a foreign country."

This contention of appellees with respect to the exceptions in question, if sound, would lead to rather fanciful

results. Thus, under the first exception, a soldier killed or injured in the important and perilous combat activities of war would be denied a recovery; while there would be a perfect claim for the soldier killed or injured in non-combat activities. Under the second exception, for a soldier injured or killed while stationed in Canada, no recovery; for a soldier injured or killed at Plattsburg, New York, just a few miles from the Canadian border, again a recovery. It is difficult for us to think that Congress intended such results to flow from the Federal Tort Claims Act.

Judicial authority on the precise problem before us is very scant. As far as we know, no federal appellate court has decided this question. In *Troyer* v. *United States* (Civil Action No. 4723), the action against the United States was dismissed by the United States District Court for the Western District of Missouri. The leading case seems to be *Jefferson* v. *United States*, decided by District [fol. 50] Judge Chesnut in the United States District Court for the District of Maryland. When this case first came before him, 74 F. Supp. 209, Judge Chesnut denied without prejudice the motion to dismiss; but when the case was before him for final disposition, 77 F. Supp. 706, the complaint was dismissed. See Hulen (U. S. District Judge), Suits on Tort Claims against the United States, 7 Fed. Rules Decisions 689, 694-695.

There was a clear factual distinction between the Jefferson case and the case before us. There the injury was service-caused since the claim was based on the negligence of an army surgeon while performing a surgical operation on the soldier. With us, the injuries were service-connected though not service-caused; for, at the time of the accident, appellees were on furlough or leave, riding in their privately owned automobile. Counsel for appellees, relying heavily on this factual distinction between the two cases, contend that the Jefferson decision does not control the instant case.

We readily admit the added and greater reason for denying recovery where the injury is service-caused (the Jefferson case) than where the injury is not service-caused (the present case). It is easy to conjure up the unfortunate results, including the subversion of military discipline, if soldiers could sue the United States for injuries incurred by reason of their being in the armed service of their country. If soldiers could sue for such injuries as illness based

on the alleged negligence of the company cook or mess sergeant, or if soldiers who contract sickness on wintry sentry duty had a right of action against the Government on the allegation of a negligent order given by the company commander, then the traditional grousing of the American soldier would result in the devastation of military discipline and morale.

[fol. 51] However, as we read his opinion, the cogent and powerful reasoning of Judge Chesnut is applicable to soldiers regardless of whether or not the injury is service-caused. And the Federal Tort Claims Act, as we interpret it, either excludes (subject, of course, to the express exceptions) soldiers altogether or completely includes them. We are quite unable to find in the Act anything which would justify us in holding that Congress intended to include death of, or injury to, a soldier, which was not service-caused (the instant case) and to exclude service-caused injury or death (the Jefferson case).

Our attention is called to the fact that in an early draft of the Federal Tort Claims Act (H. R. 181, introduced by Mr. Celler) there was an express exception with reference to soldiers, and the Act was finally enacted without this exception. The argument is made that when Congress, with this exception brought to its attention, deliberately omitted this exception from the final draft of the Act, it must fairly be inferred that Congress clearly intended to include soldiers within the scope of the Act.

This omitted exception (H. R. 181, section 402(8)) reads as follows:

> "Any claim for which compensation is provided by the Federal Employees' Compensation Act, as amended, or *by the World War Veterans' Act of 1924.*" (Italics ours.)

Thus a careful reading of this section shows that it did not exclude soldiers as a class from the benefits of the Act. It merely excepted (in addition to claims under the Federal Employees' Compensation Act) "Any claim for which compensation is provided * * * by the World War Veterans' Act of 1924,"—that is, merely and solely claims com-[fol. 52] pensable under a single Act of Congress, the World War Veterans' Act of 1924.

It is certainly arguable that Congress, when this exception was finally considered and rejected, must have been

familiar with the *Dodson* and *Bradey* cases. If so, and Congress did intend to include soldiers within the scope of the Act, every dictate of common sense would seem to require that Congress would manifest this intention not by inference or implication but, on so important a matter, by emphatic positive expression to that effect, in words so clear that they could readily be understood, even by federal judges. So radical a departure from previous policy and thought should certainly have been expressly stated and not left to inference. It might well have been, too, that Congress, aware of the considerations advanced in this opinion thought (as we do) that the Act, in its final form, did not apply to soldiers.

Judge Chesnut, in his opinion in the *Jefferson* case, 77 F. Supp. at page 712, stated:

> "The problem here is made more difficult by reason of the fact, as noted in the previous opinion in this case, that section 421 of the Act, 28 U. S. C. A. § 943, contains numerous types of claims which are excepted from the coverage of the Act, none of which, however, include the instant situation, *although in a prior proposed Act for the same general purpose, there was included such an exception.* Nevertheless, as previously stated, I reach the conclusion that the implied exception does exist in this case." (Italics ours.)

Again, at 77 F. Supp. page 713, Judge Chesnut, in referring to "Senate Report No. 1400, and also in the House Committee Report of July 22, 1946" said:

> [fol. 53] "And again in commenting on the stated exceptions to the Act appearing in section 421, it was said that the exceptions include 'claims which relate to certain governmental activities which should be free from threat of damage suits, or for which adequate remedies are already available.'"

And we quote another statement from his opinion, 77 F. Supp. at page 714:

> "The case strongly emphasizes the particular nature of government-soldier relationship and this furnishes strong support for the view that it was not the intention of Congress in passing the Tort Claims Act to include in the phrase 'any claim' those by former soldiers for

service-connected disabilities for which there was already existing a large body of federal legislation.

"Again it may be noted that section 410(a) also provides with respect to the test of liability as follows: 'Subject to the provisions of this title, the United States shall be liable in respect of such claims, to the same claimants, in the same manner, and to the same extent, as a private individual under like circumstances.'

"This phraseology is seemingly inapt if it had been the intention of Congress to give soldiers additional redress for service-connected disabilities. It is hardly conceivable to analogize the liability of the United States to that of a private individual in respect to service-connected disabilities in view of the government-soldier particular relationship."

For the reasons advanced in this opinion, we think the Federal Tort Claims Act does not apply to claims by soldiers in the United States Army, even when those claims arise out of injuries or death which, as here, are not [fol. 54] service-caused. Both of the judgments in favor of the plaintiffs-appellees in the District Court must, therefore, be reversed.

*Reversed.*

[fol. 55] PARKER, Circuit Judge, Dissenting:

These are appeals by the United States from judgments in favor of claimants under the Federal Tort Claims Act of August 2, 1946, 60 Stat. 842, 28 USCA 921. Plaintiffs were a soldier and the administrator of a deceased soldier of the United States Army. The claims were for damages on account of injuries received by the soldier and for the death of the deceased soldier resulting from the negligence of a civilian employee of the United States in the operation of an army truck. The two soldiers were on furlough and were riding with their father, a civilian, in a private automobile on a public highway and were not engaged in any business connected with their army service. The trial court found that the collision which resulted in the injury of one of the soldiers and the death of the other was due solely to the negligence of the civilian employee of the United States who was operating the army truck which ran into the automobile in which they were riding. Judgments were entered in favor of the soldier plaintiff for $4,000 damages

on account of personal injury and in favor of the administrator of the deceased soldier for $25,000 on account of wrongful death and $425 property damage.

The father of the two soldiers was injured as a result of the same collision and he was awarded $5,000 damages; but no appeal was taken from that judgment and no question is raised on the appeals before us as to the finding of the District Judge on the question of negligence. The contention of the United States is that recovery under the tort claims act must be denied to the soldier and the administrator of the deceased soldier on the ground that claims arising out of the injury of or killing of soldiers is not covered by [fol. 56] the act. An alternative contention is that plaintiffs are precluded of recovery because the mother of the deceased soldier was awarded a death gratuity under existing law of $468.00 and the injured soldier was granted $27.60 per month disability compensation by the Veterans Administration on account of the injury that he had received.

The principal question in the case is whether the court shall read into the act an exception excluding soldiers from the right to recover under its provisions. I see no basis for reading such an exception into the act. Legislation is a matter for Congress, not for the courts; and the language used by Congress clearly covers soldiers as well as civilians.*

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*The pertinent language of the statute, 60 Stat. 843-844, is as follows:

"Sec. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States; sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accord-

It is neither reasonable not respectful to Congress for the courts to assume that the import of the general language used in the statute was not understood or that language excluding soldiers from the benefit of the act was omitted through inadvertance. The act was passed at a time when the country was deeply conscious of the rights and claims of soldiers. The greatest army in the history of the country was being demobilized but many hundreds of [fol. 57] thousands of men were still under arms, and it is hardly probable that Congress could have overlooked the fact that claims on their part would be covered by the general language used. Added to this is the fact that prior bills considered by Congress excluded claims compensable under the World War Veterans Act;* and it is fair to assume that these bills with their exclusions were before the draftsmen of this act. Then, too, the act itself, in Sec. 402(c), expressly mentions members of the military and naval forces as among those for whose acts liability is

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ance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances. * * *

(b) The judgment in such an action shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the Government whose act or omission gave rise to the claim.

* H. R. 5373, introduced into the House July 21, 1941, 77 Cong. 1st Sess., S. 2221, introduced into the Senate, 77 Cong. 2d Sess., H. R. 6463 introduced into the House, 77 Cong. 2d Sess., January 26, 1942, and H. R. 181, introduced into the House January 3, 1945 and committed to the Committee of the Whole House and ordered to be printed Nov. 26, 1945, 79 Cong. 1st Sess., Union Calendar No. 392, all were tort claims bills and all contained a section setting forth exceptions in practically the same language as section 421 of the Federal Tort Claims Act hereinafter quoted, except that all of them contained an additional exception in the following language:

"(8) Any claim for which compensation is provided by the Federal Employees' Compensation Act, as amended, or by the World War Veterans' Act of 1924, as amended."

established, and in section 424(a) repeals the act of July 3, 1943, 57 Stat. 372, 31 USCA 223(b), which authorized the Secretary of the Army to settle claims against the United States, not exceeding $1,000, for damage caused by military personnel or civilian employees of the army: It is not reasonable to assume that the claims of soldiers were overlooked at a time when soldiers and their rights were so prominently in the public mind, when prior proposed legislation dealt explicitly with that matter and when the act itself repealed legislation under which limited relief could be granted them.

And it is not reasonable to assume that at the end of a victorious war, when the heart of the country was filled with gratitude to the soldiers for their achievements on the field [fol. 58] of battle, Congress would have passed a statute discriminating against them and leading to such absurd results as would be presented by the case at bar, if the position of the government is sustained. In this case the position of the soldiers was precisely that of their civilian father. They were not engaged in military duty, but were riding, as he was, in a privately owned automobile on a public highway. To say that he, the civilian, may recover, but that they must be denied recovery merely because they are soldiers would certainly come as a shock to one not familiar with legal refinements; and the shock would not be alleviated by the knowledge that the mother of the deceased had been awarded a death gratuity of $468.00 and the injured man disability compensation of $27.60 per month. It would be thought that they were entitled to these pension benefits under the laws of the United States just as the seaman is entitled to maintenance and cure from his vessel, as a sort of accident and health insurance incident to the relationship* and that the fact that these were received would constitute no reason for denying to the soldier the more substantial recovery to which any civilian would be entitled under like circumstances.

Another reason for holding that it was not the intention of Congress to exclude soldiers from the protection afforded by the act is that the act itself lists twelve exceptions to its application under the heading of exceptions and no such

* See *Smith* v. *United States* 4 Cir. 167 F. 2d 550.

exception is listed among them.* Not only is this true, but [fol. 59] one of the exceptions, (j), expressly refers to the military and naval forces and provides that any claim arising out of their combatant activities in time of war shall not be covered by the act. If it had been intended that claims on behalf of members of the military and naval forces should not be covered, the inclusion of exception (j) would certainly have suggested that express language be

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* The text of the act, 60 Stat. 845-846, is as follows:

"Exceptions. Sec. 421. The provisions of this title shall not apply to—(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance of the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused. (b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter. (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer. (d) Any claim for which a remedy is provided by the Act of March 9, 1920 (U.S.C., title 46, secs. 741-752, inclusive) or the Act of March 3, 1925 (U.S.C., title 46, secs. 781-790, inclusive), relating to claims or suits in admiralty against the United States. (e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of the Trading with the Enemy Act, as amended. (f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States. (g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters. (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. (i) Any claim for damages caused by the fiscal operations of the treasury or by the regulation of the monetary system. (j) Any claim

used for that purpose." The rule applicable is elementary law and is well stated with citation of the controlling authorities in 50 Am. Jur. p. 455-456 as follows:

> [fol. 60]. "* * * where express exceptions are made, the legal presumption is that the legislature did not intend to save other cases from the operation of the statute. In such case, the inference is a strong one that no other exceptions were intended, and the rule generally applied is that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted, and excludes all other exceptions or the enlargement of exceptions made."

For cases in which the rule has been applied, see *Moore Ice Cream Co.* v. *Rose, Collector*, 289 U. S. 373, 377; *Cunard Steamship Co.* v. *Mellon* 262 U. S. 100, 128; *Lapina* v. *Williams* 232 U. S. 78, 92; *Wood* v. *Wilbert* 226 U. S. 384, 390; *Equitable Life Society* v. *Clements* 140 U. S. 226, 233. In the case last cited, the Supreme Court, speaking through Mr. Justice Gray, in construing general terms of a statute governing life insurance policies as applicable to the case before the court, had the following to say with regard to the effect of a section prescribing specific exceptions:

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arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war. (k) Any claim arising in a foreign country. (l) Any claim arising from the activities of the Tennessee Valley authority."

The language of the Act is precisely the language contained in H. R. 181 to which reference has heretofore been made except that it omits the exception as to claims for which compensation is provided and in section (j) inserts the word "combatant" before activities.

Section 421 (j) as originally drawn excluded any claim arising out of "activities" of the military and naval forces or coast guard during time of war. It was amended on its passage through Congress to exclude only claims arising out of "combatant activities", (See 92 Cong. Record 10143), thus showing that the mind of Congress was expressly drawn to liabilities arising in connection with the military and naval forces.

"This construction is put beyond doubt by sec. 5986, which, by specifying four cases (two of which relate to the form of the policy) in which the three preceding sections 'shall not be applicable,' necessarily implies that those sections shall control all cases not so specified, whatever be the form of the policy."

What seems a conclusive reason for not reading into the act the exception suggested, however, is that this exception was originally contained in the tort claims act which was introduced into Congress as H.R. 181 January 3, 1945, and was omitted, with apparent deliberation, when that bill was incorporated as the Tort Claims Section of the Legisla- [fol. 61] tive Reorganization Act. See H.R. 181 and Report No. 1400 on the Legislative Reorganization Act. p. 30. where the following language appears:

"Attention is called to the fact that there is now on the House Calendar a bill (H.R. 181, 79th Cong.) almost identical with this title. The essential difference is that the House bill puts a maximum limitation of $10,000 on claims for which suit may be brought, whereas this title as reported by your committee contains no such limitation. The committee is of the opinion that in view of the banning of private claim bills in the Congress no such limitation should be imposed, and that with respect to this type of claim the Government should be put in the same position as any private party. For the information of the Senate the following statement from the House Committee report on H.R. 181 (H.Rept. No. 1287, 79th Cong., 1st Sess.), covering the history of this legislation and a summary of existing law is incorporated and made a part of this report:":

H. R. 181 contained thirteen exceptions in the section which became section 421 of the Tort Claims Act, one of which was as follows:

"(8) Any claim for which compensation is provided by the Federal Employees' Compensation Act, as amended, or by the World War Veterans' Act of 1924, as amended."

This exception was omitted from the Tort Claims Act when the others were written in as Section 421. In my opinion

the court is without power to write back into an act by interpretation a section which Congress has thus deliberately omitted. The only excuse for reading in an exception by interpretation is that Congress must be presumed to have intended that an exception apply; but Congress could not [fol. 62] be presumed to intend that an exception apply, when it deliberately struck the exception from the act upon its passage.

The foregoing conclusion is not answered by the fact that the exception in H.R. 181 related to claims for which compensation is provided by the World War Veterans Act of 1924 as amended, and not to soldiers' *eo nomine*. The only argument advanced for excluding soldiers from the benefit of the act is that provision is made for them elsewhere. The only provision made for them elsewhere, so far as compensation for injuries is concerned, is in the World War Veterans Act of 1924 as amended; and when Congress had before it a provision excluding claims covered by this act as amended and deliberately omitted it from the legislation as passed, the conclusion is inescapable that it was not intended to exclude soldiers from the benefit of the act even as to claims so covered.

The government places special reliance upon the decisions in *Dobson* v. *United States*, 2 Cir. 27 F. 2d 807 and *Bradley* v. *United States*, 2 Cir. 151 F. 2d 742. These cases were sufficiently distinguished by Judge Chesnut in his opinion in *Jefferson* v. *United States* 74 F. Supp. 209, 212-213, where he said:

> "But aside from the difference in wording between the Public Vessels Act and the Suits in Admiralty Act and the Tort Claims Act, it is to be importantly borne in mind that the last mentioned Act represents a marked departure by the United States with respect to the waiving of sovereign immunity. It is a comprehensive Act which, subject to the exceptions therein contained, acknowledges liability of the sovereign for injuries and damages to property and persons generally where the damage results from negligence in the performance [fol. 63] of duties by its employees. This comprehensive Act was passed subsequent to the various special Acts waiving immunity under certain conditions and to a limited extent, as in the Public Vessels Act and the Suits in Admiralty Act. By one of the exceptions it

does not apply to claims or suits in admiralty against the United States under the Suits in Admiralty Act, 46 USCA secs. 741-752 inclusive, or the Public Vessels Act, 46 USCA secs. 781-790 inclusive. But outside of the specific exceptions, as already noted, it does apply to 'any claim against the United States, for money only, accruing on and after January 1, 1945.'"

It should be noted that the claims in suit here do not arise out of injuries connected with the military service of plaintiffs, as was the case in *Jefferson* v. *United States* 77 F. Supp. 706. Entirely different considerations might operate to deny recovery in such case, as is suggested in the opinion of Judge Chesnut. Since the act does no more than give the right to sue the government and adopts the law of the state in which the injury has occurred with respect to the establishing of liability, the question arises, as to an injury caused by army service, whether under the law of the state there is any liability for such an injury. No such question is presented here; and the only ground upon which it could be answered in the negative does not exist with respect to an injury which has no connection with army service. In that case, liability would be held not to exist because of lack of basis in state law. Here, the only way in which liability can be avoided is to read into the statute an exception to language which admittedly covers the case, an exception which Congress evidently considered and decided not to incorporate in the act.

[fol. 64] It is urged that, if the act is construed to cover claims of military and naval personnel, it will result in a flood of litigation and disrupt discipline in the army and navy; but, even if this be true, the language of the act, being clear as it is, the matter is one for Congress and not for the courts. It may well be doubted, however, that any such fear is well founded. A reading of the exceptions will demonstrate that most claims which could cause trouble along the lines feared are expressly excepted; and, as for other claims, it might well be thought that less harm would result from allowing a soldier to sue on them than from denying him the rights accorded to every civilian. Certainly this is true of claims not arising out of service, which would be comparatively few in number and should not cause trouble. It is true, of course, that statutes are to receive a reasonable construction and that, in determining the legislative intent,

exceptions are to be read into their language to avoid injustice, oppression or absurd consequences. *United States* v. *Kirby*, 7 Wall. 482; *Lau Ow Bew* v. *United States* 144 U. S. 47; *Sorrells* v. *United States* 287 U. S. 435, 446-448. In this case, however, it can well be argued that more injustice and absurd consequences would result from the exception than from its omission. Congress evidently thought so when it omitted the exception contained in the text of H.R. 181 when adopting the text of that bill as the Tort Claims Act.

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[fol. 65] JUDGMENT—Filed and Entered August 26, 1948

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5758

UNITED STATES OF AMERICA, Appellant,

vs.

WELKER B. BROOKS, Appellee.

Appeal from the District Court of the United States for the Western District of North Carolina

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of North Carolina, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgement of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of North Carolina, at Charlotte, for further proceedings in accordance with the opinion of the Court filed herein.

Armistead M. Dobie, U. S. Circuit Judge. Harry E. Watkins, U. S. District Judge.

[fol. 66] I dissent. John J. Parker, Senior Circuit Judge.

September 23, 1948, petition of appellee for a stay of mandate is filed.

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ORDER STAYING MANDATE—Filed September 27, 1948

[Style of Court and Title omitted]

Upon the Petition of the appellees, by their counsel, and for good cause shown,

It Is Ordered that the mandates of this Court in the above entitled cases be, and the same are hereby, stayed pending the applications of the said appellees in the Supreme Court of the United States for writs of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided the applications for the writs of certiorari are filed in the said Supreme Court within 30 days from this date.

September 25, 1948.

John J. Parker, Chief Judge Fourth Circuit.

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[fol. 67] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 5759

UNITED STATES OF AMERICA, Appellant,

versus

JAMES M. BROOKS, Administrator of the Estate of Arthur L. Brooks, Deceased, Appellee

Appeal from the District Court of the United States for the Western District of North Carolina, at Charlotte

May 25, 1948, the transcript of record is filed and the cause docketed.

May 27, 1948, two orders extending the time to and including May 28, 1948, for filing record on appeal and docketing action are filed.

Same day, the appearance of W. S. Blakeney is entered for the appellee.

June 1, 1948, the appearance of David E. Henderson, United States Attorney, is entered for the appellant.

June 8, 1948, brief and appendix on behalf of the appellant are filed.

June 15, 1948, the appearance of Paul A. Sweeney is entered for the appellant.

June 24, 1948, consent of appellant to extension of time to file appellee's brief is filed.

[fol. 68] July 1, 1948, brief on behalf of the appellee is filed.

ARGUMENT OF CAUSE

July 5, 1948, (June term, 1948) cause came on to be heard, together with No. 5758, before Parker and Dobie, Circuit Judges, and Watkins, District Judge, and was argued by counsel and submitted.

OPINION—Filed August 26, 1948

Note: The opinion appears at page 41 of the record and is, therefore, omitted here.

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[fol. 69] JUDGMENT—Filed and Entered August 26, 1948

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5759

UNITED STATES OF AMERICA, Appellant,

vs.

JAMES M. BROOKS, Administrator of the Estate of Arthur L. Brooks, Deceased, Appellee

Appeal from the District Court of the United States for the Western District of North Carolina

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of North Carolina, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of North Carolina, at Charlotte,

for further proceedings in accordance with the opinion of the Court filed herein.

Armistead M. Dobie, U. S. Circuit Judge. Harry E. [fol. 70] Watkins, U. S. District Judge.

I dissent. John J. Parker, Senior Circuit Judge.

September 23, 1948, petition of appellee for a stay of mandate is filed.

ORDER STAYING MANDATE—Filed September 27, 1948.

[Style of Court and Title omitted]

Note: This order appears at page 66 of the record and is, therefore, omitted here.

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[fol. 71] STIPULATION

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. —

WELKER B. BROOKS, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent

JAMES M. BROOKS, Administrator of the Estate of ARTHUR L. BROOKS, Deceased, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent

Subject to this Court's approval, it is hereby stipulated and agreed, by and between counsel for the respective parties hereto that for the purpose of the petitions for writs of certiorari herein, the printed record may consist of the following:

1. Appendix to brief of appellant in the United States Court of Appeals for the Fourth Circuit.

2. The proceedings had before the United States Court of Appeals for the Fourth Circuit.

It is further stipulated and agreed that petitioners will cause the Clerk of the United States Court of Appeals for the Fourth Circuit to file with the Clerk of the Supreme Court a complete certified transcript of the record on each appeal in the Court of Appeals for the Fourth Circuit; and [fol. 72] that, in the event that the petitions for writs of certiorari are granted, the printed record shall consist of the proceedings in the court below and such portions of the complete transcripts of records on appeal in that court as the parties may designate.

It is further stipulated and agreed that in any of the briefs filed herein reference may be made to the records filed as hereinabove provided in the Supreme Court of the United States.

This the 23 day of September, 1948.

W. S. Blakeney, Counsel for Petitioners; Philip B. Perlman, Counsel for Respondent.

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[fol. 73] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the appendix to brief of appellant and the proceedings in the said Court of Appeals in the therein-entitled causes, as the same remain upon the records and files of the said Court of Appeals, and constitute and is a true transcript of the record and proceedings in the said Court of Appeals in said causes, made up in accordance with the stipulation of counsel for the respective parties, for use in the Supreme Court of the United States on applications for writs of certiorari.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 29th day of September, A. D., 1948.

Claude M. Dean, Clerk of the United States Court of Appeals for the Fourth Circuit. (Seal.)

[fol. 63] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 388

ORDER ALLOWING CERTIORARI—Filed January 3, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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[fol. 64] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 389

ORDER ALLOWING CERTIORARI—Filed January 3, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1948**

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**No. 388** 388

WELKER B. BROOKS,

*Petitioner,*

*versus*

UNITED STATES OF AMERICA

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**No. 389** 389

JAMES M. BROOKS, ADMINISTRATOR OF THE ESTATE OF ARTHUR L. BROOKS, DECEASED,

*Petitioner,*

*versus*

UNITED STATES OF AMERICA

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## PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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WHITEFORD S. BLAKENEY,
PIERCE AND BLAKENEY,
*Counsel for Petitioners.*

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AMES M. BROOKS, Administrator of the Estate of Arthur L. Brooks, Deceased,

*Petitioner,*

*versus*

UNITED STATES OF AMERICA

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## PETITION FOR WRITS OF CERTIORARI

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*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The petitioners above named respectfully pray this Court for a writ of certiorari directed to the United States Court of Appeals for the Fourth Circuit, to the end that this Court may review the decision which the said Court

of Appeals has rendered in these cases; and the Petitioners respectfully show to the Court:

## Statement of Case

These are suits under the Federal Tort Claims Act, Title 28, United States Code, section 2671 *et seq* (formerly 28 U. S. C. A. 921 *et seq*). They were instituted simultaneously in the United States District Court for the Western District of North Carolina, have been jointly dealt with in all proceedings up to this point and for convenience will sometimes be hereinafter referred to as one case.

The circumstances out of which these cases arose may be briefly stated as follows: on the night of February 17, 1945, at about 8:00 P. M., Welker B. Brooks and Arthur L. Brooks, brothers, were riding with their father, James M. Brooks, in their private automobile on a public highway near Fayetteville, North Carolina. Both Welker B. Brooks and Arthur L. Brooks were enlisted men in the United States Army, but they were on leave or furlough at the time and "engaged in their private concerns and not on any business connected with their military service" (R. 41).

As their car reached an intersection in the highway, it was struck by a motor-truck which was being driven by an employee of the United States Government, acting within the scope of his employment. (R. 10, 20 and 41). Welker B. Brooks was seriously injured and Arthur L. Brooks was instantly killed. The District Court found that the collision was caused entirely by negligence on the part of the Government employee and entered judgments in behalf of Welker B. Brooks and James M. Brooks, administrator of the estate of Arthur L. Brooks (R. 10 and 20).

The Government then moved that the judgments be set aside and the actions dismissed upon the ground that Welker B. Brooks and Arthur L. Brooks being members

of the United States armed service had no rights under the Federal Tort Claims Act (R. 23). This motion the District Court denied (R. 12 and 25). But upon appeal the United States Court of Appeals for the Fourth Circuit reversed the District Court upon the broad ground set forth in the Government's motion referred to above, that is: that no matter what the circumstances or situation may be, a member of the armed services of the United States has no right of action under the Federal Tort Claims Act (R. 47 and 49).

## Jurisdiction of This Court

Jurisdiction to review, through the procedure of certiorari, the decision of the Court of Appeals in these cases is conferred upon this Court by the provisions of Title 28, United States Code, section 1254 (formerly 28 U. S. C. A. 347).

## Questions Involved

Did Congress intend that members of the armed services should have no rights of action under the Federal Tort Claims Act?

More particularly, if a member of the armed services is injured under circumstances wholly unconnected with military affairs and not in any way growing out of any armed service status or relationship, and if the situation is one which may readily occur and does occur with respect to persons not in the armed service and is a situation in which other persons, in general, do clearly have rights of action under the Federal Tort Claims Act—did Congress nevertheless intend that in such situation the claimant, merely because of the circumstance that he belongs to the armed service, shall have no right of action?

## Reasons Why Certiorari Should Be Granted

1. This is a case of first impression in this Court. It squarely presents a broad and prominent issue in the interpretation and application of an important new Federal Statute; and the issue is such that it unquestionably ought to be decided and settled by this Court.

2. In the Federal Tort Claims Act the United States broadly waives its immunity to tort actions and consents that such actions may be brought against it. This case presents the issue as to whether such waiver and consent was not intended, under any circumstances, as to millions of United States citizens, namely, the members of our armed services.

3. The case is thus one of general public interest and concern, involving an important and novel question of Federal law which calls for the attention and judgment of this Court.

4. The case should, moreover, be reviewed and decided by this Court because, it is respectfully submitted that, it has been wrongly decided in the Court of Appeals below, the majority in that Court having adopted an unnatural course of reasoning in the face of conclusively opposing considerations, to reach a result not only erroneous but also inequitable—all of which is fully shown in a brief hereinafter following.

5. It is further to be noted, as indicated above, that the decision of this case in the Court of Appeals was divided, Chief Judge John J. Parker strongly dissenting from the majority composed of one Circuit Judge and one District Judge. Thus, considering the contrary opinion and ruling of the District Judge who presided at the trial, judicial authority upon the case is in fact evenly divided up to the present time.

Wherefore, upon all the foregoing and upon the reasoning and authorities set forth in the brief annexed hereto, the petitioners earnestly pray this Court to grant certiorari in this case to the end that the Court may review the decision rendered herein by the Court of Appeals below.

WALKER B. BROOKS,
JAMES M. BROOKS,
*Administrator of the Estate of Arthur L. Brooks, Deceased;*
By: WHITEFORD S. BLAKENEY,
PIERCE AND BLAKENEY,
*Counsel for Petitioners.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

# No. 388

WELKER B. BROOKS,

*Petitioner,*

vs.

UNITED STATES OF AMERICA.

# No. 389

JAMES M. BROOKS, Administrator of the Estate of Arthur L. Brooks, Deceased,

*Petitioner*

vs.

UNITED STATES OF AMERICA

## BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

### References to Opinion in Court Below

The decision of the United States Court of Appeals for the Fourth Circuit was rendered on August 26, 1948. The majority opinion and the dissenting opinion have not yet been printed in the official reports but do appear fully in the record which has been filed in this Court (R. 40).

## Jurisdiction of This Court

As pointed out hereinabove (P. 2) in the Petition for Writ of Certiorari, jurisdiction to review the decision of the Court of Appeals in this case is conferred upon this Court by the provisions of Title 28, United States Code, section 1254 (formerly 28 U. S. C. A. 347).

## Statement of Case

A full outline and statement of the case appears hereinabove (P. 2) in the Petition for Writ of Certiorari.

## Specification of Error

The petitioners assign as error the reversal by the Court of Appeals of the judgments which were rendered in the District Court.

## ARGUMENT

### I

**Except as otherwise specified therein, Congress clearly intended the Federal Tort Claims Act to apply to members of the armed services, the same as to other citizens in general.**

A. *If the Act be Accepted as Written, there is No Problem.*

First and foremost, it is to be noted that if the Act be accepted as written, the case is immediately resolved in favor of the petitioners. Problem is created only by the Government's insistence that there be written into the Statute a provision which does not appear upon its face.

The central provision of the Act, Title 28, United States Code, section 2671 *et seq.* (formerly 28 U. S. C. A. 921 *et seq.*), is that:

> " . . . The United States District Court . . . shall have exclusive jurisdiction to hear, determine and

> render judgment on any claim against the United States . . . on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government . . ."

It is, says the Court of Appeals, (R. 41), "crystal clear" that this language covers a claim by a member of the armed services as well as it does a claim by any other person. Despite this admitted clarity, however, the Court declares that the Statute must be read as if there appeared in it after the phrase "any claim" a large qualification:—"except in behalf of members of the armed services of the United States". It is respectfully submitted that when a court finds statutory language "crystal clear", it should leave it as it finds it and not undertake to modify or qualify its natural effect and meaning.

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms."
>
> *Caminetti* v. *United States* 242 U. S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442, 452;
>
> *Mackenzie* v. *Hare*, 239 U. S. 299, 309, 36 S. Ct. 106, 60 L. Ed. 297, 300;
>
> *Adams Express Company* v. *Kentucky*, 238 U. S. 190, 199, 35 S. Ct. 824; 59 L. Ed. 1267, 1270.

> "(This) is not to construe the statute but to add an additional and qualifying term to its provisions. This we are not at liberty to do under the guise of construction, because, as this court has so often held, where the words are plain there is no room for construction."
>
> *Osaka Shosen Kaisha Line* v. *United States*, 300 U. S. 98, 101; 57 S. Ct. 356; 81 L. Ed. 532, 534.

The proper viewpoint is well expressed, with citations of numerous authorities, in 50 Am. Jr., pp. 204-207, as follows:

> "A statute is not open to construction as a matter of course . . . Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning . . . the court has no right to look for or impose another meaning. In the case of such unambiguity, it is the established policy of the courts to regard the statute as meaning what it says, and to avoid giving it any other construction than that which its words demand. The plain and obvious meaning of the language used is not only the safest guide to follow in construing it, but it has been presumed conclusively that the clear and explicit terms of a statute expresses the legislative intention, so that such plain and obvious provisions must control. A plain and unambiguous statute is to be applied, and not interpreted, since such a statute speaks for itself, and any attempt to make it clearer is a vain labor and tends only to obscurity."

These principles have been recognized by the Court of Appeals for the Fourth Circuit in the past:

> "But the language of the statute is free from ambiguity; and, where this is the case, its plain meaning is to be accepted without resort to the rules of interpretation."
>
> *In Re Boggs-Rice Company*, 66 F (2d) 855, 858 (C. C. A. 4th).

And in this case the court agreeing that the language of the Act clearly covers and includes claims by members of the armed services, it was improper for the court then to proceed to read such claims out of the Act.

B. *The Broad Exception or Exclusion Which the Government Seeks to Read into the Act is not Permissible Because Congress Enumerated the Exceptions and Exclusions Which it Intended the Act to Have*

The contention that the Act is to be accepted as written is supported by the fact that in the Act Congress expressly named and defined such claims as it desired to exclude from the operation of the Act. It is not to be argued that Congress failed to give attention to what exceptions it desired to make in respect to the coverage of the Act and that the Act being such a broad departure from traditional governmental policy and immunity, it becomes necessary for the court to write in such exceptions as it thinks Congress would have desired. Not so at all. For Congress did give its attention to the very question of what sort of claims and claimants should be excluded from the Statute, and in what situations and to what extent. And Congress did expressly write into the Statute the exceptions and exclusions which it desired the Statute to have, listing and carefully defining twelve in number, seriatim, Title 28 United States Code, section 2680 (formerly 28 U. S. C. A. 943).

Two of these exceptions, (j) and (k), go a long way in themselves toward answering two of the Government's major contentions. The argument that it is a too radical departure from past policy and from the military atmosphere to permit armed service personnel to have rights of action against the Government, is to a great extent answered by the exception (j) that no claim "arising out of combatant activities . . . during time of war" is cognizable under the Act. The fear that rights of action in the hands of military personnel will give rise to a greater volume of suits than such rights of action in the hands of citizens generally is likewise largely relieved by the same exclu-

summary provision and by the further exception, (k) which has its chief practical application to military personnel, that no "claim arising in a foreign country" may be maintained under the Act.

Such being the situation with respect to the exceptions and exclusions prescribed by Congress, it is no proper function or prerogative of a court to say, as the Court below has said, that Congress really intended another important exception but forgot or overlooked writing it in and that therefore the court will do so. Why should the court assume that Congress was absent-minded or inadvertent to what it was doing? Since Congress spelled out with care and detail exceptions to the Statute, should not the court rather assume that Congress acted consciously and deliberately, declared the exclusions and exceptions which it desired the Statute to have, and did not write in any general exclusion of members of the armed services because it did not intend any such exclusion. In short, Congress having addressed itself to the task of naming exceptions and exclusions is it to be accepted that Congress named all it desired and intended, or is it to be presumed that Congress overlooked a very important one which it did desire and intend? The Court below says that the latter is to be assumed. The petitioners respectfully submit that such assumption is the very opposite of natural and logical reasoning and is contrary to normal principles of statutory construction.

"... The section contains its own specific provisos and limitations, and these, on familiar principles, strongly tend to negative any other and implied exception."

*Lapina v. Williams, Commissioner*, 232 U. S. 78, 92, 58 L. Ed. 515, 520.

"The implication is that any proceeding not covered by the exception is to be subject to the rule."

*Moore Ice Cream Co. v. Rose, Collector of Revenue*, 289 U. S. 373, 377, 77 L. Ed. 1265, 1269.

"It (the exception) serves to show that where, in other provisions, no exception is made . . . none is intended."

*Cunard Steamship Co. v. Mellon, Secretary of the Treasury*, 226 U. S. 100, 128, 67 L. Ed. 894, 904.

"This construction is put beyond doubt by § 5986, which, by specifying four cases . . . in which the three preceding sections 'shall not be applicable,' necessarily implies that those sections shall control all cases not so specified . . ."

*Equitable Life Assurance Society v. Pettus*, 140 U. S. 226, 283, 35 L. Ed. 497, 500.

"These special exceptions exclude any other."

*Wood v. A. Wilbert's Lumber Co.*, 226 U. S. 384, 390, 57 L. Ed. 264, 267.

"It is well settled that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted and excludes all other exceptions."

25 R. C. L., Section 230, page 983.

". . . Where express exceptions are made, the legal presumption is that the legislature did not intend to save other cases from the operation of the statute. In such case, the inference is a strong one that no other exceptions were intended, and the rule generally applied is that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted, and excludes all other exceptions or the enlargement of exceptions made."

50 Am. Jur., Section 434, page 455.

*C. Congress Specifically Considered and Specifically Rejected an Exception Having the Exact Effect Which the Lower Court Has Now Read Back Into the Act.*

Utterly conclusive of the case would seem to be the fact that Congress specifically considered and deliberately rejected an exception having exactly the same effect as that

which the Court below now writes into the Act. This is to be seen undeniably in the following circumstances.

The original predecessor of the Federal Tort Claims Act was a bill, H. R. 7236, introduced in the 76th Congress. It, like the present Law, provided for general waiver of the Government's immunity to tort suits and in it there were listed substantially the same twelve exceptions and exclusions which appear in the present Act. But in addition to these, there was at that time another exception proposed which would have excluded from the coverage of the Act:

> "Any claim for which compensation is provided by the . . . World War Veterans' Act of 1924, as amended."

The theory of this exception, just as the Government now urges in support of the lower Court's decision in the present case, was that the World War Veterans' Act of 1924, as amended, confers certain governmental benefits, such as the right to compensation payments, upon all persons injured while in the armed services of the United States, and therefore such persons should not also have the benefit of a general statute permitting tort suits against the Government. The clear purpose and effect of the proposed exception was thus to exclude all members of the armed services from rights of action under the contemplated Statute. Conversely it seems to have been considered obvious (see Congressional Record, Vol. 86, Pt. II, 76th Congress, 3d Sess., 1940, pp. 12015-12032 and see also footnote, p. 212; *Jefferson v. United States*, 74 F. Supp. 209) that under the proposed statute's general opening of the way to tort suits against the Government, members of the armed services would be able to sue like all other persons unless some such exception was expressly written into the Statute. Though debated, the bill was of course not enacted by the 76th Congress.

In the 79th Congress, the same bill, re-titled H. R. 181, was again introduced with all its exceptions including the additional or thirteenth exception quoted and discussed above. Congress again considered the Bill, *struck out of it the exception in question*, and enacted the remainder as the present Federal Tort Claims Act. Yet the Court below now sees fit to put back into the Statute the exact effect that Congress delibertately struck out of it!. In this it is respectfully submitted, the Court exceeded its province.

Chief Judge Parker, in his vigorous dissenting opinion below, clearly points out this "conclusive" feature of the case (R. 56):

> "In my opinion the court is without power to write back into an act by interpretation a section which Congress has thus deliberately omitted . . . Congress could not be presumed to intend that an exception apply, when it deliberately struck the exception from the Act, upon its passage."

The Federal Tort Claims Act, as its history partially outlined above indicates, was no hasty or ill-considered piece of legislation. And the Court below does wrong to treat it as if it were. The Court does wrong to assume that Congress was not aware of or did not comprehend what it was doing, even though it used words "crystal clear", when it enacted a statute broad enough to include within its scope members of the armed services along with all other persons generally. The Court does wrong to assume that when Congress gave its attention to the subject of exceptions or exclusions from the Act and carefully etched out twelve such exceptions, it overlooked and failed to mention a thirteenth exception which it really intended. Certainly and above all the Court does wrong when it disregards the fact that Congress did consider such thirteenth exception. And for the Court to write the effect of that exception back

into the Statute after Congress deliberately and specifically struck it out, is unjustifiable.

II

**In any event, a person, merely because he is a member of the armed service, is not to be denied right of action under the Federal Tort Claims Act if he has suffered an injury wholly unconnected with military affairs and not arising out of any armed service status or relationship.**

Welker B. Brooks and Arthur L. Brooks were soldiers. *But their being soldiers had nothing whatever to do* with their respective injury and death. As the Court below recognizes (R. 41), they were at the time of the event here involved, "on leave or furlough engaged in their private concerns and not on any business connected with their military service." They were riding with their father in their private automobile on a public highway when they were struck by a Government vehicle negligently driven by a civilian employee of the Government.

They were *not on the highway because of their being soldiers.* The event which brought death to one and serious injury to the other did not occur in any sense whatsoever because of their having military status. No armed service duty, activity or relationship was any factor in bringing the injuring force in contact with them.

It is inconceivable that their father, who rode beside them, should be allowed to recover, but they, because they had on uniforms, are denied all right of action! Shall a man, as he walks the public streets or travels the highways or goes about his personal affairs be at greater risk than other citizens because of the fact that he serves in the armed forces and they do not? It would seem that if there had to be a distinction in civil rights as between the soldier and his fellow citizens, it should certainly not be to his disadvantage.

Suppose that a soldier, home on furlough, is standing on a public sidewalk talking with a group of his friends as they welcome him back to town. And suppose that a motor vehicle negligently driven by an employee of the United States Department of Commerce, for example, runs up on the sidewalk and injures the soldier and everybody else in the group. Thereupon, all of them, *except the soldier*, according to the Court below, have rights of action under the Federal Tort Claims Act. He alone has no right in court.

Shall the Government thus make a man's military status *the basis for distinguishing against him* in situations unrelated to military affairs? Shall a nation which dispenses largesse the world around thus discriminatorily deal with the men who fight its battles—even when it *negligently* injures them in non-military relationships? And above all, shall a court labor to achieve this result in the face of the clearly manifested intent of Congress to the contrary?

## III

**Upon analysis, it is to be seen that the Government's contentions are of no validity.**

It is argued by the Government that since Congress in the various Veterans' Acts has provided certain benefits in case of injury to or death of military personnel, it cannot also have intended them to have rights of action under the present Statute. It would seem that a very proper reaction is—why not? Such veterans' "benefits" might well be regarded as in the nature of accident and health compensation incident to their military service and not of such magitude as to rendered it impossible or unlikely that Congress should also wish to grant to military personnel the same rights of action granted to other citizens generally in the Federal Tort Claims Act.

Is it not reasonable that in consideration of his service to

his country, Congress in the Federal Tort Claims Act may have desired the soldier to have what was now being bestowed upon all others in addition to the special benefits he already had—any recovery by him under the Federal Tort Claims Act admittedly to be diminished, however, by the amount of any compensation payments received by him under the Veterans' Acts. If Congress saw fit to deal thus generously, or fairly, with those who serve in the armed forces, there would seem to be no reason why the Court should quarrel with such intention or be reluctant to recognize and enforce it.

Nor are the benefits under the Veterans' Acts so overwhelming as might be supposed Actually in the instant case, the record shows no benefits received except as follows: in the case of Arthur L. Brooks, a $468 gratuity payment to the mother of the deceased; and in the case of Welker B. Brooks, hospital and medical care until he was discharged from the Army and disability payments currently in the amount of $27.60 per month. By contrast to the rights of civilians under the Federal Tort Claims Act, these veterans' "benefits" are obviously meager indeed.

The United States Employees' Compensation Act, 5 U. S. C. A. 751 *et seq.* provides for civilian employees of the Government a system of benefits corresponding to that provided for members of the armed services by the various Veterans' Acts. This Court has referred to that system for compensation of governmental civilian employees as "elaborately and carefully worked out" (see *Dahn* v. *Davis*, Director General, 258 U. S. 421, 431; 42 S. Ct. 320; 66 L. Ed. 696, 699), just as the Government and the court below now refer to the system for compensation of service men under the Veterans' Acts. But it has been expressly and repeatedly held that under Federal statutes waiving governmental immunity to tort suits, civilian employees of the Government, like

other citizens generally, may sue, even though they have available to them the "comprehensive" benefits provided by the United States Employees' Compensation Act.

It has been so held under the Suits in Admiralty Act, 46 U. S. C. A. 742 *et seq.*

*United States* v. *Marine*, 155 F. (2d) 456 (C.C.A. 4th).

It has been so held under the Federal Employers Liability Act involving a situation in which the defendant, a corporation, was wholly owned by the United States.

*Panama Railroad* v. *Minnix*, 282 F. 47;
*Panama Railroad* v. *Strobel*, 282 F. 52.

It has likewise been so held under the Railroad Control Act of 1918, 40 Stat. 451.

*Dahn* v. *McAdoo, Director General*, 256 F. 549;
*Dahn* v. *Davis, Director General*, 258 U. S. 421; 42 S. Ct. 320; 66 L. Ed. 696.

In *Dahn* v. *Davis, Director General, supra*, this Court said:

> "Thus, plainly, the petitioner had the right to sue the Director General of Railroads for negligently injuring him, and, if successful, his recovery must have been from the United States. . . . This reference to the two acts shows that the petitioner had two remedies, each for the same wrong, and both against the United States. . . ."

In *United States* v. *Marine, supra*, the Court of Appeals similarly said:

> "We are not at liberty to alter or add to the plain language of the statute to effect a purpose which does not appear on its face. There is certainly no suggestion in this language, or in any other language of the Suits in Admiralty Act, which implies that the right is limited to persons outside the provisions of the Em-

ployees' Compensation Act, and it is a fair inference that if Congress had intended that result it would have said so in unmistakable terms. . . .

"What we have shown . . . impels the conclusion that there is nothing in the Act which expressly or impliedly excludes a Government employee from filing a libel under its terms."

If then, civilian employees of the Government may sue the United States under other statutes which waive governmental immunity, and certainly, therefore, may also sue under the Federal Tort Claims Act, despite the benefits available to them under the United States Employees' Compensation Act, why may not service men likewise sue under the Federal Tort Claims Act, despite the benefits available to them under the Veterans' Acts?

The Veterans' Acts, of course, contain no stipulation that they shall be the service man's only remedy or recourse against the Government. Under compensation statutes which provide however that they constitute sole and exclusive remedies, as is the case with many state workmen's compensation acts, for example, in North Carolina where the present actions arose, it is, nevertheless, held that an employee may sue his employer in ordinary court action if his employer has negligently injured him under circumstances, as in the present case, having no relation to his employment status.

*Barber* v. *Minges*, 223 N. C. 213, 25 S.E. (2d) 837 (1943).

The Government points to *Dobson* v. *United States*, 27 F. (2d) 807; *Brady* v. *United States*, 151 F. (2d) 742; and *Sandoval* v. *Davis*, 288 F. 56, as being authorities to the effect that members of the armed services could not sue the United States under other statutes which waived governmental immunity to tort actions. With respect to the statutes involved in those cases, Public Vessels Act, 46 U. S.,

C. A. 781 *et seq.* and Railroad Control Act of 1918, 40 Stat. 451 (now repealed), it is first to be noted that none of the highly decisive features discussed under the headings I(B) and I(C) of this brief were present. Moreover those statutes waived governmental immunity under certain conditions and to a limited extent only, applied only to the particular agencies of transportation referred to in their titles, and certainly evidenced no fundamental and over all policy to reverse the general immunity of the United States in tort cases, such as is the clear purpose of the Federal Tort Claims Act. Even *Jefferson* v. *United States*, 74 F. Supp. 209, 212 and 213, strongly approved by the court below, rejects the *Dobson*, *Brady* and *Sandoval* cases as containing any reasoning or as constituting authority for denying service men the right of suit under the present Act.

Furthermore, in fundamental contrast to the present case, the injuries involved in the *Dobson*, *Brady* and *Sandoval* cases were "service-caused", that is, occurred because the injured men were members of the armed forces and incurred their injuries during the course of activities necessitated by or incident to their military service. In the present case, as hereinabove emphasized, such was definitely not the situation.

As mentioned above, the lower court speaks with high approval of *Jefferson* v. *United States*, 74 F. Supp. 209 and 77 F. Supp. 706. That case was, however, fundamentally different from the instant case in the same basic respect, in that the injury involved was "service-caused". *Jefferson* v. *United States* is no authority upon the present situation. On the contrary, the reasoning of the opinions in that case indicates that the court would have reached there the conclusion for which the petitioners here contend, had the injury in that case been unrelated to military status as is the situation in the present case. The court in that case

emphasizes the fact that the plaintiff and the person who negligently injured him were both members of military personnel and were both on active duty at the time of and in connection with the plaintiff's injury.

The underlying thought expressed by the court in the *Jefferson* case is that the Federal Tort Claims Act makes the United States liable only ". . . under circumstances . . . where private persons would be liable. . . ." The court's reasoning is that the Act does not contemplate and cover claims arising from relationships between a claimant and the operator of an army, navy or other military establishment, for the simple reason that no such claims or suits are cognizable under local law or "law of the place". But irrespective of the validity of this reasoning, it does not have, nor did it purport to have, any application to such situation as exists in the instant case.

The plaintiff in *Jefferson* v. *United States* was, on the operating table, where he was negligently injured, *only because of his being a soldier*. The army surgeon was operating on him *only because of the military and army relationship* between the two of them. In the present case, Welker B. Brooks and Arthur L. Brooks were on the public highway, not in the course of any action or activity as soldiers. They were struck by the Government's employee, not because of any military or army relationship between him and them, but because they, in their purely private affairs, got out on the highway at the same time he was driving on it. Such are very usual and ordinary "circumstances" (to use the language of the Act) under which the "law of the place" makes private persons liable—and such, therefore, are "circumstances" in which the Act makes the United States liable.

The court below reasons that since Congress specified situations, for example under exceptions (j) and (k) here-

inabove referred to, in which no person should have any right of action under the Federal Tort Claims Act, therefore Congress must have intended that members of the armed service should have no rights of action whatever under the Act. Thus, says the court, it would be "fanciful" to allow a service man to sue for an injury wholly unrelated to his military service since, by reason of exception (j), he is not allowed to sue for an injury received in combat. And he is not to be permitted to sue for an injury received in Plattsburg, New York, for example, inasmuch as he is precluded, by exception (k), from suing in case of an injury incurred just across the border in Canada!. In other words since Congress did not see fit to give him a right of action for injury wherever occurring and under all circumstances, therefore he should have no right of action for injury anywhere or under any circumstances.

It is respectfully submitted that the exact reverse of this is the more normal reasoning and certainly produces a more equitable result. Since Congress took the pains to spell out situations in which rights of action should not be allowed to the soldier, nor to anybody else for that matter, wherein does it follow that Congress intended him to have no rights of action at all? If Congress specifies situations in which he is shut off from suing, is it not the natural inference that in other situations he may sue—otherwise why was it necessary to declare that in the designated cases he could not sue?

The ironic aspect of the Court's reasoning on this point is, however, that it would deny any application of the Act whatever. It would not only exclude members of the armed services from the operation and benefit of the Act, but likewise all other persons whomsoever! Exceptions (j), and (k) apply generally to all persons. They preclude anybody from suing under the Act on any claim "arising out of combatant activities" or on any claim "arising in a

be allowed to sue under the Act for any injury because he could not sue for an injury occurring just outside the United States, then likewise all persons are precluded from suing for any injuries, because they too could not sue, any more than the soldier, for injuries occurring just outside the United States.

The natural view would seem to be that the exclusion of rights of action in certain situations is all the more reason for affirming such rights of action in all other situations. The fact that a soldier has no right of suit for a leg injured in Canada is certainly in itself no reason to deny him a right of suit for his other leg injured in the United States. It does not follow either in logic or equity that since he cannot sue for both, *therefore* he cannot sue for either! To vary the metaphor, since Congress in the Act's exceptions trimmed the statutory loaf as it placed it in the hands of citizens in general, how does the Court find that to be a reason for denying the loaf to the service man altogether?

Various ills, such as "the subversion of military discipline" and "a flood of litigation," are prophesied if members of the armed services are held to have rights of action under the present Statute. The first answer to this is that if, despite such considerations, Congress saw fit, as is herein shown, to extend the benefit of the Act to members of the armed services along with other persons in general, that is a decision which the court should not quarrel with nor undertake to reverse.

In the next place, it would seem that such fears of evil consequences are not well-founded. As has been pointed out above express exceptions in the Act eliminate a major proportion of possible claims by military personnel, that is, all claims arising out of combatant activities in time of war and all claims arising in a foreign country. But whether well-founded or not, such forebodings have no application to cases such as the present. There is no tend-

ency toward subversion of military discipline in the right of service men to sue for injuries wholly unconnected with military matters. And it does not multiply litigation that a soldier may sue for non-military injury which would have occurred to him just as truely had he been a civilian and for which, as a civilian, he would have a right of suit under the Act.

The Court below denounces "the inept draftsmanship" of the Act "in failing to make clear and express provisions" as to members of the armed forces. It is respectfully submitted that "the inept draftsmanship" is to be found only in what the Court has written into the Act.

> "The rules of interpretation are resorted to for purpose of resolving ambiguity, not for purpose of creating it."
>
> *In Re Boggs-Rice Company*, 66 F. (2d) 855, 858 (C. C. A. 4th).

If Congress intended what the court says it intended, that is to exclude members of the armed services from the coverage of the Act, then it did indeed draw the Act ineptly for, as hereinabove shown, there is nothing in the Act manifesting any such intention. Admittedly the Act is inept, in fact it wholly fails, to express the intent for which the Government contends.

What the court therefore means by its statement is that the Act is ineptly drawn to express the intention for which the petitioners contend. But how so? What language is more apt to express the intention that the Act shall cover the claims of members of the armed services along with the claims of other persons in general—what words are more apt to express such intention than those which Congress used, namely, "any claim"? The court's suggestion comes to the proposition that there should be inserted in the Statute some provision to the effect that:—"The words 'any

claim' are intended to include any claim by members of the armed services of the United States."

Such would have been "inept draftsmanship" indeed. After using all-inclusive wording, it was certainly not necessary and it would not have been wise to refer to a certain class of claims as being included in the all-inclusive language. To do so would have been productive of endless question and confusion as to whether other classes of claims not so singled out should or should not be considered as covered by the Act. It is respectfuliy submitted that the Federal Tort Claims Act is aptly and properly written to effect what was, as shown in this brief, undoubtedly the intention of Congress upon the issue here involved, namely, that members of the armed service should not be totally excluded from the benefit of the Act.

## IV

**Welker B. Brooks' right of action is not barred by the fact that he has received certain disability payments from the United States Veterans' Administration.**

This aspect of the Welker B. Brooks' case is not discussed by the Court below and it would seem that the Court acquiesced in the decision and action of the District Court on this issue. Probably, however, the Government will continue to urge its contentions on this point and the matter is therefore here briefly discussed.

The Government's argument is that even though the petitioners have rights of action under the Federal Tort Claims Act, Welker B. Brooks' right of action is, nevertheless, lost to him because he has been receiving from the Veterans Administration compensation for his disability at the rate of $27.60 per month.

It is, in the first place, to be noted that Welker B. Brooks' right of action "in accordance with the law of the place

where the act or omission occurred" (to use the language of the Act) included a right to recover for such elements of damage as the pain and suffering he endured on account of his injuries, which elements are not in any way included in the disability payments he has been receiving from the Veterans Administration. The District Court points this out (R. 32 and 39), making it clear that it took the disability payments into consideration in diminution of Welker B. Brooks' verdict but did not regard such payments as altogether destroying the statutory right of action.

Upon the arguments hereinbefore advanced and particularly in view of the fact that Congress specified the respects in which it wished to qualify or withhold the application of the Statute, the reasonable and proper conclusion would seem to be that if Congress wished to bar suits where disability payments have been received, it would have said so.

In *Jefferson* v. *United States*, *supra*, it is pointed out that Congress in drawing the bills predecessor to the present Act, expressly excluded all rights of action if any disability benefits had been received. Congress certainly, therefore, acted consciously and with deliberate intention in omitting any such provision from the present Act. From all of which it certainly follows that if a member of the armed services otherwise has a right of action under the Federal Tort Claims Act, then the receipt of disability payments from the Veterans Administration does not operate in bar thereof but only in diminution of damages.

A recent decision of this Court would seem to be in point against the Government on this issue. In *United States* v. *Standard Oil Company*, 332 U. S. 301; 67 S. Ct. 1604, this Court held that when a soldier is tortiously injured in time of war, he may receive medical care and hospitalization from the United States Government, and may at the same time, collect damages from the third party tort-feasor, and that in such situation, there is no subrogation on the part

of the Government to the soldier's rights against the third-party tort-feasor. Since the Act now under consideration makes the Government just as liable as a private tort-feasor would be, it would seem to follow from this decision that the Government may make veteran's payments to a service man and at the same time be liable to him as a tort-feasor.

The Government relies upon the proposition that if Welker B. Brooks had any right of action under the Federal Tort Claims Act, then he had to elect whether he would exercise such right or accept disability payments. As a matter of reality, he, of course, had no opportunity to elect for the simple reason that the Federal Tort Claims Act was not in existence at the time he was injured nor at the time he began to receive disability benefits. Likewise, if the Veterans Administration should discontinue its payments to him, as it may do, neither would he then have any effective election to proceed under the Federal Tort Claims Act, because the time limitations prescribed in the Act would have run against him.

Certainly, the $27.60 payments which Welker B. Brooks has received should apply, as the District Court applied them, only in diminution of the amount of his claim and not in complete bar of his right to sue.

Upon all that is herein set forth, the petitioners earnestly insist that their application for writ of certiorari should be granted and that the decision of the Court below should be reviewed and reversed.

Respectfully submitted,

WHITEFORD S. BLAKENEY,
PIERCE AND BLAKENEY,
*Counsel for the Petitioners.*

(9178)

NOS. 388 and 389

# In the Supreme Court of the United States

OCTOBER TERM, 1948

---

WELKER B. BROOKS, *Petitioner*

v.

THE UNITED STATES OF AMERICA

---

JAMES M. BROOKS, Administrator of the Estate of Arthur L. Brooks, Deceased, *Petitioner*

v.

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**On Petition for Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the District Court for the Western District of North Carolina (R. 29-34) is not reported. The opinion of the Court of Appeals for the Fourth Circuit (R. 40-49) is reported at 169 F. 2d 840.

## JURISDICTION

The judgments of the Court of Appeals were entered in both cases on August 26, 1948 (R. 58, 60). The petition for writs of certiorari was filed on October 30, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

## QUESTION PRESENTED

Whether the District Courts of the United States may, under the Federal Tort Claims Act,[1] enter judgments on claims for damages resulting from injury or death of a soldier where the claimants have already been paid pensions, death benefits, and all other benefits provided by military and veterans' laws.

## STATUTE INVOLVED

The pertinent provisions of the Federal Tort Claims Act[2] are reprinted in the Transcript of Record (R. 1).

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[1] C. 753, 60 Stat. 842. The provisions of the Act have been incorporated into the revision of Title 28, United States Code, by the Act of June 25, 1948 (Public Law 773, 80th Cong., 2d sess.) at Sections 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, and 2671-2680. This revision took effect September 1, 1948. However, the new code sections, which are here relevant, are for convenience still referred to in the aggregate as the Federal Tort Claims Act.

[2] Section 410(a), reprinted in the Record (R. 1), now appears, with changes not here material, as Section 1346(b) of the new Title 28. See footnote 1, *supra*.

## STATEMENT

On February 17, 1945, Arthur L. Brooks, accompanied by his brother, Welker B. Brooks, both enlisted men in the Army on authorized leave, was driving in his privately owned car on a public highway near Fayetteville, North Carolina (R. 30). Upon entering an intersection in the highway, the car collided with an Army truck driven by a civilian employee of the War Department on official business (R. 11, 21, 30). Arthur Brooks was killed instantly and his brother was injured (R. 11, 21).

Shortly after his discharge from the Army in December 1945, Welker B. Brooks applied to the Veterans' Administration for disability compensation and has been receiving, ever since May 1946, $27.60 monthly for the injuries he sustained in the accident involved in this case (R. 27-28). In addition to his full army pay and allowances during the period of his incapacity, the record also shows that the United States furnished, without cost to him, all necessary medical, surgical, and hospital services (R. 28).

The mother of the deceased soldier Arthur L. Brooks, has received from the United States a six-months' death gratuity payment and the Government is also paying her and her husband the proceeds of a $5,000 National Service Life Insurance policy (R. 29, 35-36). The record further discloses that a claim filed by the deceased soldier's parents

for monthly pension benefits was not allowed because dependency had not then been shown (R. 36).

On December 24, 1946, James M. Brooks, as administrator of the estate of his son, Arthur, brought suit against the United States in the United States District Court for the Western District of North Carolina under the Federal Tort Claims Act (R. 13-16). Welker B. Brooks filed a similar suit at the same time for damages for his personal injuries (R. 3-6). The United States filed answers to both complaints, denying negligence on the part of the civilian employee of the War Department and alleging contributory negligence. After the cases were consolidated and tried together, the District Court, on conflicting evidence, found that the Army truck had been operated negligently, and that the injuries sustained by Welker B. Brooks, as well as his brother's death, were proximately caused by such negligence (R. 10-11, 20-22). The court, on November 8, 1947, entered judgment for $4,000 for Welker's personal injuries and for $25,000 for the death of Arthur (R. 12, 22). In its opinion, the District Court held that the receipt of disability compensation by Welker B. Brooks from the United States did not bar additional recovery by him under the Federal Tort Claims Act (R. 32). On January 7, 1948, that court also denied motions by the United States to dismiss the suits on the ground of lack of jurisdiction of the District Courts to entertain suits under the Federal Tort

Claims Act for damages for injuries to, or death of, a serviceman (R. 12-13, 25).

On appeal, the court below, rejecting each of the contentions here reasserted by petitioners, held that "the Federal Tort Claims Act does not apply to claims by soldiers in the United States Army, even when those claims arise out of injuries or death which, as here, are not service-caused" (R. 49). It accordingly reversed both judgments of the District Court (R. 49). Judge Parker dissented (R. 49-58).

## ARGUMENT

Petitioners seek review of the decision below, not only on the ground that it was incorrect, but also on the grounds that the basic question decided is one of first impression involving the application of an important federal statute and calls for an authoritative ruling by this Court (Pet., p. 4). We submit, however, that the decision below is correct and that it accords with decisions of other federal courts interpreting similar statutes. This Court has heretofore denied review of like questions arising under other acts waiving governmental immunity from tort liability where petitioners sought an interpretation which would force the United States twice to compensate injured members of the armed forces. *Bradley v. United States*, 151 F. 2d 742 (C. C. A. 2), certiorari denied, 326 U. S. 795, rehearing denied, 328 U. S. 880; *Dobson v. United*

*States*, 27 F. 2d 807 (C. C. A. 2), certiorari denied, 278 U. S. 653. Moreover, the judgments below are sustainable on an independent ground, not passed upon by the court below, that petitioners, having elected to accept the benefits conferred on members of the armed forces and their dependents by various other statutes, may not now recover under the Federal Tort Claims Act.

1. Petitioner's chief contention (Pet. 8-13) that the Federal Tort Claims Act, if read literally, covers soldiers' personal injury and death claims, ignores evidence of a contrary legislative intent.[3] That intent, as revealed by the purpose of the Act, by a well-defined legislative policy providing an adequate and comprehensive scheme of special statutory benefits for a soldier's injury or death, and by Congressional awareness, at the time of the passage of the Act, of the consistent judicial interpretation of cognate legislation, repudiates the literal reading urged by petitioner.

a. The purpose of the Federal Tort Claims Act, which appeared as Part IV of the Legislative Reorganization Act of August 2, 1946, (60 Stat. 812), is: "To provide for increased efficiency in the legislative branch of the Government." Prior to the Act, Congress had been compelled to divert its time and energies to the consideration of thousands

[3] Cf. *Boston Sand Co.* v. *United States*, 278 U. S. 41, 48; *United States* v. *Dickerson*, 310 U. S. 554, 561.

of private bills authorizing payment for personal injury or death caused by tortious conduct of governmental employees. Section 131 of the Legislative Reorganization Act specifically prohibited the introduction of such private bills (60 Stat. 821), substituting access to the courts through the Federal Tort Claims Act, and thus facilitated greater legislative efficiency.[4]

That the Act of August 2, 1946, was not aimed at the elimination of private acts passed on account of soldiers' deaths or injuries, but rather at the elimination of the huge number of bills introduced in behalf of non-servicemen, is evident from the fact that no appreciable number, if any at all, were enacted in behalf of servicemen.[5] The well-known

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[4] See Report of the Joint Committee on the Reorganization of Congress, Sen. Rep. No. 1011, 79th Cong., 2d sess., p. 25 (1946), discussing this point under the heading: "More Efficient Use of Congressional Time."

[5] The Administrator of Veterans' Affairs has reported that for each of the years from 1942 through 1947 there were absolutely no private acts whatsoever in effect conferring monetary benefits on veterans of World War II or on their dependents (Annual Reports of the Administrator of Veterans' Affairs for 1942, p. 67; for 1943, p. 66; for 1944, p. 68; for 1945, p. 69; for 1946, p. 108; for 1947, p. 146).

[6] The view that Congress intended the Federal Tort Claims Act to afford relief to private citizens rather than to servicemen is expressly confirmed by the available Congressional committee reports quoted by the court below (R. 42).

Still further evidence that the Private Laws, which Congress intended to eliminate by enacting the Federal Tort

fact that members of the armed forces were entitled to pension benefits, disability payments, free hospitalization and medical care for any injury during their period of service made unnecessary the passage of private acts in their behalf. There is no necessity, therefore, for going beyond the express purpose of the Act and expanding its scope to include claims by servicemen.

b. It is well established that where there is in existence a complete and comprehensive system of statutes pertaining to a specific subject matter, subsequent enactments of a general nature should generally be construed to except that specific subject

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Claims Act, were not laws relating to soldiers' claims is found in the very language of these Private Laws. These laws, without exception, provide that the damages awarded thereby are "in full settlement" or in "full satisfaction" of all of the beneficiary's claims against the United States as a result of the accident for which the award is made. (*E.g.*, Private Law 11, 59 Stat. 688; Private Law 12, 59 Stat. 689; Private Law 134, 59 Stat. 738; Private Law 366, 59 Stat. 836; Private Law 197, 58 Stat. 949; Private Law 589, 58 Stat. 1110; Private Law 49, 57 Stat. 605; Private Law 164, 57 Stat. 717). Where a damage award is so conditioned on fully releasing the United States from all liability, it obviously is of a type unsuited to the needs of a soldier who otherwise would be entitled to pension and disability benefits, hospitalization and medical care, and the other benefits normally due him because he was a soldier at the time the injuries were sustained. For the same reasons, the similar language of the Federal Tort Claims Act itself renders that Act unavailable for the relief of soldiers' claims. See 28 U. S. C. 2672, 2679.

matter.[7] Adhering to this principle in *United States* v. *Sweet*, 245 U. S. 563, this Court allowed the exception of such specific matter, even though the statute had not listed such an exception, but had, like the Federal Tort Claims Act, listed several other exceptions.[8]

The decision of the court below applies this well-established principle in accordance with the rule of the *Sweet* case. The comprehensiveness and adequacy of the already existing statutory scheme of benefits for soldiers and their dependents, for disability or death incurred while in service, is partially described in the opinion of the court below (R. 43).[9] These existing federal laws include pro-

[7] *Ozawa* v. *United States*, 260 U. S. 178, 193, 194; *United States* v. *Jefferson Electric Mfg. Company*, 291 U. S. 386, 396; *United States* v. *Barnes*, 222 U. S. 513, 520; *United States* v. *American Trucking Association*, 310 U. S. 534, 544; *Townsend* v. *Little*, 109 U. S. 504, 512; *Missouri* v. *Ross*, 299 U. S. 72, 76; *United States* v. *Fixico et al.*, 115 F. 2d 389, 393 (C. C. A. 10); *Iriarte et al.* v. *United States*, 157 F. 2d 105, 108 (C. C. A. 1).

[8] The maxim: *expresso unius est exclusio alterius*, is, of course, nothing more than a guide to statutory construction, useful only in ascertaining legislative intent, and should not be applied when its use would result in repudiating such intent. *United States* v. *Barnes*, 222 U. S. 513, 519; *Industrial Trust Co.* v. *Goldman*, 59 R. I. 11, 18.

[9] Most of the vast number of these statutes are codified in Title 38, U. S. C. (Pensions, Bonuses, and Veterans' Relief). In addition, Title 10 (Army), Title 34 (Navy), and Title 37 (Pay and Allowances of Army, Navy, Marine Corps, Coast Guard * * *) contain many other statutes on military benefits

visions for monthly pension payments to dependents for death of a soldier,[10] monthly pension payments to the soldier for disabling injuries incurred in service,[11] full pay during periods of incapacity,[12] free and complete hospitalization and medical care,[13] death gratuities equivalent to one half of the deceased serviceman's annual pay,[14] and relatively

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and perquisites. The continuing and special interest of Congress in military and veterans' affairs is evident from the introduction, during the fiscal year 1947, of approximately 2,300 bills pertaining to veterans' benefits, many of which had for their purpose material changes in existing laws affecting veterans' relief (Annual Report of the Administrator of Veterans' Affairs, 1947, p. 64).

[10] Act of March 20, 1933, sec. 1(c), 48 Stat. 8, 38 U. S. C. 701(c). See 38 C. F. R. 1946 Supp. 35.06, p. 5913.

[11] Act of March 20, 1933, sec. 1(a), 48 Stat. 8, 38 U. S. C. 701(a). Disability payments range as high as $300 per month. Act of September 20, 1945, 59 Stat. 533, 534, amending Vet. Reg. No. 1(a), part I, par. II(o). See also Public Law 877 (80th Cong., 2d sess.), for additional benefits ranging from $14.00 to $56.00, conferred recently by Congress on disabled veterans having dependents.

[12] See Act of May 17, 1926, 44 Stat. 557, 10 U. S. C. 847a; Act of June 16, 1942, 56 Stat. 363, as amended, 37 U. S. C. 109, 110; cf. Article of War 107, 41 Stat. 809, 10 U. S. C. 1579.

[13] Act of June 7, 1924, sec. 10, 43 Stat. 610, as amended, 38 U. S. C. 434; Act of March 20, 1933, sec. 6, 48 Stat. 9, 38 U. S. C. 706; 10 C. F. R. Cum. Supp. 77.2(a) and 77.15(b).

[14] Act of December 17, 1919, as amended, 41 Stat. 367, 57 Stat. 599, 10 U. S. C. 903; Act of December 10, 1941, 55 Stat. 796, 10 U. S. C. 456; Act of May 22, 1928, 45 Stat. 710, as amended, 34 U. S. C. 943.

inexpensive life insurance up to $10,000 under the National Service Life Insurance Act.[15]

c. The benefit and compensation provisions of this comprehensive statutory scheme for servicemen have always been viewed as exclusive, and have impelled consistent holdings to the effect that military personnel may not recover from the United States on a claim already cognizable under the benefit and compensation provisions of other statutes, notwithstanding the fact that the statute under which suit was brought made no specific exception of the claims of members of the armed services. *Bradey* v. *United States*, 151 F. 2d 742 (C. C. A. 2), certiorari denied, 326 U. S. 795, rehearing denied, 328 U. S. 880, and *Dobson* v. *United States*, 27 F. 2d 807 (C. C. A. 2), certiorari denied, 278 U. S. 653 (suits under Public Vessels Act, 46 U. S. C. 781 et seq.); *O'Neal* v. *United States*, 11 F. 2d 869 (E. D. N. Y.), affirmed, 11 F. 2d 871 (C. C. A. 2); *The West Point*, 71 F. Supp. 206, 212 (E. D. Va.); *Seidel* v. *Director General of Railroads*, 149 La. 414; *Moon* v. *Hines, Director General of Railroads*, 205 Ala. 355; *Goldstein* v. *New York*, 281 N. Y. 396.[16]

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[15] Act of October 8, 1940, sec. 602, 54 Stat. 1009, as amended, 38 U. S. C. 802.

[16] Several additional cases are in accord, *e.g.*, *Bryson* v. *Hines*, 268 Fed. 290 (C. C. A. 4); *Posey* v. *T. V. A.*, 93 F. 2d 726 (C. C. A. 5); *Kennedy* v. *New York*, 16 N. Y. Supp. (2) 288; *McAuliffe* v. *New York*, 176 N. Y. Supp. 679.

Since Congress in enacting the Federal Tort Claims Act may be presumed to have been familiar with the *Bradey, Dobson*, and related cases,[17] it is reasonable to assume that it intended that that Act should be interpreted in a like manner. Congressional awareness that such an exception would be implied by the courts, as it had been in the prior statutes, may make understandable, as was indicated by the court below (R. 48), the omission of a specific "serviceman" exception from the Tort Claims Act.[18]

[17] That Congress, in enacting a law similar to those previously construed by the courts, is deemed to have been cognizant of those judicial decisions and is considered, in the absence of persuasive considerations to the contrary, as having intended the same construction to apply to the later statute, is well settled. *United States Navigation Co., Inc.* v. *Cunard S. S. Co., Ltd., et al.*, 284 U. S. 474, 481; *The Abbotsford*, 98 U. S. 440; *Overstreet et al.* v. *North Shore Corp.*, 318 U. S. 125, 131, 132; *Chicago & Alton Railroad Co.* v. *United States*, 49 C. Cls. 463, affirmed, 242 U. S. 621; *United States* v. *Security-First National Bank of Los Angeles et al.*, 30 F. Supp. 113 (S. D. Calif.), appeal dismissed, 113 F. 2d 491 (C. C. A. 9); *Progressive Miners of America et al.* v. *Peabody Coal Co. et al.*, 7 F. Supp. 340, 346 (E. D. Ill.), affirmed, 75 F. 2d 460 (C. C. A. 7); *United States* v. *Albright et al.*, 234 Fed. 202 (D. Mont.); *Plunkett* v. *United States*, 58 C. Cls. 359.

[18] The inferences drawn by petitioner from the omission, in the Federal Tort Claims Act, of exceptions in prior bills excluding claims cognizable under the United States Employees Compensation Act and the World War Veterans' Act of 1924 (Pet. 13-15) are in no way here relevant. Both proposed exceptions clearly envisaged injury to a civilian. While the 1924 Act was primarily addressed to death or injury suffered by servicemen in World War I between April

2. Also lacking in merit is petitioners' contention (Pet. 16-17, 21-22) that only those soldiers who have sustained service-caused injuries (*i.e.*, those resulting from direct military activity) should be confined to the benefits available under military and veterans' laws, and that soldiers, like petitioners, whose injuries and death were merely service-connected (*i.e.*, those occurring during the period of the soldier's service, but while he was on leave or furlough from military duties) should not only have access to such benefits but also the right to sue for additional damages under the Federal Tort Claims Act.

The court below rejected this attempted distinction, stating that there is nothing in the Act "which would justify us in holding that Congress intended to include death of, or injury to, a soldier, which was not service-caused * * * and to exclude service-caused injury or death" (R. 47). While it is true that benefits under the military and veterans' laws are payable when the serviceman's injury or death occurred in "line of duty," Congress has specifically defined that term to include any injury or death incurred during the serviceman's period of military service, whether or not the soldier at the time of his injury or death was on furlough, au-

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6, 1917, and July 2, 1921 (Act of June 7, 1924, secs. 212, 200, 43 Stat. 623, 38 U. S. C. 422, 471), it also comprehended hospitalization and pensions for certain disabilities or for death resulting from injuries sustained by the veteran after he had left the armed services.

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v. *United States*, 156 F.

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2d 599 (C. C. A. 2); *United States* v. *Marine*,[20] 155 F. 2d 456 (C. C. A. 4).

As shown above, petitioners are receiving all benefits and payments to which they are by law entitled. The benefits here, with respect to the injured serviceman, include a lifetime, monthly disability pension of $27.60, free hospitalization and medical care. With respect to the deceased serviceman, the six-month gratuity payment has been made, and monthly pension payments will be made to his parents upon their furnishing proper proof of dependency. No disavowal of these, or other payments such as the insurance benefits mentioned above, has been made. Receipt of these statutory payments constitutes, we submit, a bar to the present actions.

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[20] It is appropriate to note that the *Marine* case, heavily relied on by petitioner (Pet. 19-20), expressly recognizes that the serviceman, as distinguished from a civilian employee, has no right to sue, but as in the instant case, is restricted to the benefits due him under the regular pension and disability benefit laws. *United States* v. *Marine*, 155 F. 2d 456, 460 (C. C. A. 4).

## CONCLUSION

The decision below is correct, and there exists no conflict. The petition for a writ of certiorari should be denied.[21]

Respectfully submitted.

PHILIP B. PERLMAN,
*Solicitor General.*

H. G. MORISON,
*Assistant Attorney General.*

PAUL A. SWEENEY,
MORTON HOLLANDER,
*Attorneys.*

December, 1948.

[21] Petitioner has invited the Court's attention to the case of *Samson* v. *United States*, 79 F. Supp. 406 (S. D. N. Y.). That District Court opinion, overruling a motion of the United States to dismiss the complaint, was handed down on December 26, 1947, eight months before the decision of the Court of Appeals for the Fourth Circuit in the instant case. Since the *Samson* case has not yet gone to trial, the District Court may reconsider its position in light of the appellate opinion now available to it. Cf. *Alansky* v. *Northwest Airlines*, 77 F. Supp. 556, 559 (D. Mont.), where the court overruled a similar motion by the United States to dismiss "with the right reserved for further consideration at time of trial" since "in the meantime the decision of a higher court may be forthcoming to . . . [clarify] . . . the Act." Moreover, the reasoning in the *Samson* opinion is based on a strained interpretation of the effect of the repeal of the Military Claims Act by the Federal Tort Claims Act and on an unsound assumption that the soldier involved in the case would have been able to secure a recovery from the United

States under the Military Claims Act. That Act, however, clearly limits recovery to "reasonable medical, hospital and burial expenses actually incurred" and prohibits payment where such expenses were paid by the United States (Act of July 3, 1943, 57 Stat. 372, as amended, 60 Stat. 332; 31 U. S. C. 223b). As shown above, *supra*, pp. 9-10, all such expenses, when incurred by soldiers, are borne by the United States. Moreover, the District Court's view that the soldier's death was "not incident" to his service because he was not directly engaged in active military duties, departs from the well established rule that any injury or death of a soldier is incident to his military service, or is service connected, so long as he is not guilty of misconduct. See *supra*, pp. 10-11.

It is also appropriate to note that all other available district court opinions, even though decided before the opinion below was handed down, hold the Federal Tort Claims Act inapplicable to soldier's injury and death claims. *Jefferson* v. *United States*, 77 F. Supp. 706 (D. Md.); *Troyer* v. *United States*, 79 F. Supp. 558 (W. D. Mo.); *Atkinson* v. *United States*, unreported, (D. Colo.); *Griggs* v. *United States*, unreported, (D. Colo.). Appeals are pending in the *Atkinson* and *Griggs* cases in the Tenth Circuit and in another case arising in the Sixth Circuit where no opinion was written, *United States* v. *Armstrong*. There is nothing to indicate, should the petition in the instant case be denied, that the Courts of Appeals for the Sixth and Tenth Circuits would decline to follow the well reasoned opinion below, that of Judge Chesnut in the *Jefferson* case and the decisions of the Court of Appeals for the Second Circuit in the *Bradey* and *Dobson* cases. Thus we submit that there presently exists no occasion for this Court to entertain and decided this question. In the unlikely event that a conflict arises it will be time enough for this Court to review the problem.

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Nos. 388 and 389

# In the Supreme Court of the United States

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*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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### OPINIONS BELOW

The opinion of the United States District Court for the Western District of North Carolina (R. 23-27) is not reported. The opinion of the United States Court of Appeals for the Fourth Circuit (R. 29-47) is reported at 169 F. 2d 840.

## JURISDICTION

The judgments of the United States Court of Appeals for the Fourth Circuit were entered in both cases on August 26, 1948 (R. 47, 49-50). The petition for writs of certiorari was filed on October 30, 1948, and was granted on January 3, 1949 (R. 52). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the District Courts of the United States may, under the Federal Tort Claims Act,[1] enter judgments for damages resulting from injury or death of a soldier, where other statutes provide a complete and comprehensive system of pensions, death benefits, and other benefits for injury or death of members of the armed forces.

## STATUTE INVOLVED

The pertinent provisions of the Federal Tort Claims Act are set out in Appendix A, pp. 53-55.

## STATEMENT

On February 17, 1945, Arthur L. Brooks, accompanied by his brother, Welker B. Brooks, both enlisted men in the Army on authorized leave, was driving in his privately owned car on a public high-

[1] C. 753, 60 Stat. 842. This Act has been repealed, but its provisions have been incorporated into the revision of Title 28, United States Code, by the Act of June 25, 1948 (Public Law 773, 80th Cong., 2d sess.) at Sections 1291, 1346, 1402, 1504, 2110; 2401, 2402, 2411, 2412, and 2671-2680. This revision took effect September 1, 1948. However, the new code sections are, for convenience referred to herein as the Federal Tort Claims Act.

way near Fayetteville, North Carolina (R. 23-24). Upon entering an intersection in the highway, the car collided with an Army truck driven by a civilian employee of the War Department on official business (R. 8, 17, 24). Arthur Brooks was killed instantly and his brother, Welker Brooks, was injured (R. 9, 17).

Shortly after his discharge from the Army in December 1945, Welker B. Brooks applied to the Veterans' Administration for disability compensation and has been receiving, since April, 1946, monthly disability payments for the injuries he sustained in the accident involved in this case. The current rate of these monthly payments is $27.60, which he has been receiving since May 1, 1946 (R. 21-22). Welker B. Brooks also received his full army pay and allowances during the period of his incapacity. In addition, the United States furnished, without cost to him, all necessary medical, surgical, and hospital services (R. 22).

The mother of the deceased soldier, Arthur L. Brooks, has received from the United States a six-months' death gratuity payment (R. 16, 22). The record now before this Court does not specifically indicate that other benefits were paid by the Government by reason of Arthur's death. However, a letter from the Veterans' Administration dated August 12, 1947, addressed to the Attorney General, states that payments of $5,000 in National

Service Life Insurance proceeds were approved by the Veterans' Administration, and are presently being made by the Government to the deceased soldier's parents. That letter also states that a claim filed by his parents for pension benefits as a result of his death was not allowed because dependency had not been shown at the time of filing of that claim.[2]

On December 24, 1946, James M. Brooks, as administrator of the estate of his son, Arthur, brought suit against the United States in the United States District Court for the Western District of North Carolina under the Federal Tort Claims Act (R. 11-13). Welker B. Brooks filed a similar suit in that court at the same time for damages for his personal injuries (R. 2-5). The United States filed answers to both complaints, denying negligence on the part of the civilian employee of the War Department and alleging contributory negligence. After the cases were consolidated and tried together, the District Court, on conflicting evidence, found that the Army truck had been operated negligently, and that the injuries sustained by Welker B. Brooks, as well as his brother's death, were proximately caused by such negligence (R. 8-9, 16-17). The court, on November 8, 1947, entered judgment for $4,000 for Welker's personal injuries and for

[2] A copy of this letter is set forth in Appendix B, pp. 50-58.

$25,000 for the death of Arthur (R. 9-10, 18).[3] In its opinion, the District Court held that the fact that Welker B. Brooks "is and has been receiving monthly compensation from the Veterans' Administration since the accident" does not bar his action against the United States under the Federal Tort Claims Act (R. 25). On January 7, 1948, that court also denied motions by the United States to dismiss the suits on the ground of lack of jurisdiction of the District Courts to entertain suits under the Federal Tort Claims Act for damages for injuries to, or death of, a serviceman (R. 10, 19).

On appeal, the court below, rejecting each of the contentions here re-asserted by petitioners, held that "the Federal Tort Claims Act does not apply to claims by soldiers in the United States Army, even when those claims arise out of injuries or death which, as here, are not service-caused" (R. 38). It accordingly reversed both judgments of the District Court (R. 47, 49). Chief Judge Parker dissented (R. 38-47).

## SUMMARY OF ARGUMENT

1. While a literal reading of the language of the Federal Tort Claims Act would, as petitioners contend, extend the coverage of that Act to claims against the United States arising out of the death

[3] In addition, the District Court entered judgment for the administrator in the sum of $425 for damages to Arthur Brooks' automobile which was almost demolished by the collision (R. 18). The United States does not question the propriety of that part of the judgment.

or injury of members of the armed forces, several important considerations require the rejection of such a literal reading. It is a well-settled rule that where Congress has developed a comprehensive system of special legislation dealing with a particular subject matter, statutes of a general nature will be held to be inapplicable to the special subject matter. That rule has been regularly applied by the courts in interpreting various other statutes in which the legislature has made the Government amenable to suit for its torts. Numerous decisions under such general tort liability laws as the Public Vessels Act and the Railroad Control Act of 1918, and under comparable state legislation, hold that where the Government has already provided an adequate and comprehensive statutory system of pension, disability and other benefits for servicemen injured or killed during their period of service, that system constitutes the exclusive remedy.

Congressional awareness, at the time of passage of the Federal Tort Claims Act, of this long-established rule and its consistent application under the related tort claims legislation, makes it obvious that Congress did not intend the Federal Tort Claims Act to apply to the specialized and comprehensively-covered field of military injury or death claims.

II. The long-settled federal policy of providing an adequate and comprehensive statutory system

for handling death or injury claims of members of the armed forces dates back to the pre-Revolutionary War period. Special payments to injured soldiers was an established colonial practice. Congressional concern for such soldiers, and, in the event of their death, for their dependents, has been consistently manifested throughout each of the wars in which the United States has been engaged. The current extent of this special concern for a serviceman or his dependents can be gauged from the vast number of statutes under which benefits are now paid.

The more important of these statutes are those authorizing monthly payments for a serviceman's partial or total disability caused by injuries during his period of military service, granting monthly payments and other benefits to the widow, children and dependent parents of a deceased serviceman, authorizing him to draw full service pay during his period of incapacity, entitling him to free and complete hospitalization and medical care during and after his military service, and making available to him National Service Life Insurance.

These various statutes reveal that Congress, at the time of its passage of the Federal Tort Claims Act, had already established an elaborate and carefully worked out statutory system for dealing with injuries or death of servicemen. This statutory system is analogous to the Workmen's Compensation Laws. Under both, compensation is made promptly, without litigation, expense or

regard to fault for personal injury or death. While private industry makes payments only where the injury or death occurred in the course of actual employment, Congress has extended the compensation benefits to servicemen for disability or death suffered at any time while in military service, whether in active military duty or on leave. Limiting the private employee to the workmen's compensation benefits cannot be viewed as discriminatory. Nor should requiring a serviceman similarly to vindicate his claims against the Government through the comprehensive statutory scheme specially designed for that purpose, be so viewed.

III. That Congress did not intend the Federal Tort Claims Act to apply to claims for a serviceman's injury or death is evidenced by the purpose of the Act, several specific provisions it contains, and a general Congressional policy prohibiting duplicate compensation benefits. The immediate purpose of the Act was to shift from the Congress to the courts the time-consuming and burdensome task of considering, each year, thousands of tort claims asserted against the Government. For each claim that was favorably acted upon, a special Private Law had to be enacted. The enactment of thousands of these private laws showed a full assumption by the Congress of public liability for negligent governmental torts. The Tort Claims Act merely transferred the adjudication of such tort claims to the courts. It is significant that very few, if any, of the private laws so intended to be

eliminated by the Act, were ever passed to authorize compensation for a serviceman's injury or death claim. Reading the Act, then, in light of its purpose and the evil it sought to remedy, it is obvious that an expansion of the Act to cover such claims is unwarranted. Several specific sections of the Act show that a different view produces undesirable or absurd results which can be avoided only by holding the Act inapplicable to such claims.

Moreover, allowing claims for a serviceman's death or injury to be compensated under the Act would repudiate a firmly established Congressional policy, adhered to since 1818, which prohibits the United States from conferring duplicate compensation benefits on a serviceman for personal injuries sustained during the period of service.

Petitioners, in apparent recognition of the disruption of military discipline and morale which would otherwise ensue, do not argue that the Act should apply to injury or death caused as a result of military duty. It is their contention, however, that the Act should be viewed as applicable to injury or death which, as in the instant case, occurred during the period of military service but not as a result thereof. The lack of merit in this attempted distinction is evidenced by the fact that the statutory benefits under the comprehensive system are available in both situations.

These considerations point with sureness to the conclusion that Congress did not intend the Act to apply to such claims. They rebut completely any

inference which might otherwise arise from the failure of Congress to include in the Act an express exception of claims by persons in the armed forces.

IV. The availability of the various statutory benefits in the instant case and their acceptance by the petitioners bars the instant suits under the Federal Tort Claims Act. It is well-established under similar legislation, that the acceptance of statutory benefits by servicemen or their dependents bars a subsequent action for damages under general related legislation. It has also been recently so held with respect to a civilian employee of the Government seeking additional damages under the Federal Tort Claims Act. No different conclusion is justified merely because the Federal Tort Claims Act suit is instituted by a military employee.

## ARGUMENT

### I

**In the Absence of a Contrary Legislative Intent, Statutes of General Application Do Not Apply to Special Fields in Respect of Which Congress Has Already Enacted Complete and Comprehensive Legislation; This Rule Is Peculiarly Applicable to Claims for Injury or Death of Members of the Armed Forces**

While the Federal Tort Claims Act does not, in terms, either include or exclude claims arising out of the injury or death of members of the armed forces, it may be conceded that its language is sufficiently broad to cover such claims, and would doubtless do so in the absence of countervailing considerations. But such considerations exist. It is settled law that where Congress, over a long

period of time and through many enactments has dealt with a particular subject matter in such a manner as to create a complete and comprehensive system of law for dealing therewith, subsequent or even prior statutes of general application, which would otherwise apply, are held to be inapplicable to the special subject matter. *United States* v. *Barnes*, 222 U. S. 513, 520; *United States* v. *Sweet*, 245 U. S. 563; *Ozawa* v. *United States*, 260 U. S. 178, 193, 194; *United States* v. *Jefferson Electric Mfg. Company*, 291 U. S. 386, 396; *Missouri* v. *Ross*, 299 U. S. 72, 76; *United States et al.* v. *American Trucking Associations*, 310 U. S. 534, 544; *Townsend* v. *Little*, 109 U. S. 504, 512; *United States* v. *Fixico*, 115 F. 2d 389, 393 (C. A. 10); *Iriarte et al.* v. *United States*, 157 F. 2d 105, 108 (C. A. 1); *Cook County Nat. Bank* v. *United States*, 107 U. S. 445, 450-451. As the Court in the *Cook County Bank* case stated (p. 451), "The question is one respecting the intention of the legislature." Cf. *Dobson* v. *United States*, 27 F. 2d 807, 808-809 (C. A. 2), certiorari denied, 278 U. S. 653. The foregoing rule consistently has been applied in the interpretation of cognate acts wherein the Government has consented to suit for personal injury or death.

A. *Public Vessels Act of 1925.* The Public Vessels Act (43 Stat. 1112, 46 U. S. C. 781 *et seq.*), authorizes the institution of *in personam* suits in admiralty against the United States for damages

caused by its public vessels. Two decisions under that Act both of which were denied review by this Court, involved the identical issue raised on this appeal. In *Dobson v. United States*, 27 F. 2d 807 (C. A. 2), certiorari denied, 278 U. S. 653, and in *Bradley v. United States*, 151 F. 2d 742 (C. A. 2), certiorari denied, 326 U. S. 795, rehearing denied, 328 U. S. 880, it was held that, despite the absence of any express exclusionary provision in the Public Vessels Act, members of the naval forces could not sue the United States under that Act, inasmuch as an elaborate pension system for personal injury and death of naval personnel had already been provided by statute.

In the *Dobson* case, Judge Swan, speaking for a unanimous court, stated (27 F. 2d at 808):

> Verbally, there is nothing which excludes liability for damage to property or person of officers or crew. * * *
>
> Nevertheless the construction contended for by appellants involves so radical a departure from the government's long-standing policy with respect to the personnel of its naval forces that we cannot believe the act should be given such a meaning. The statute itself does not specify who may maintain suits under it. To allow suit by the officers and crew of the public vessel for damage caused by it to them would be too great a reversal of policy to be enacted by such general terms. The Act of October 6, 1917 (40 Stat. 389 [34 U.S.C.A. Sections 981, 982]) directs the Paymaster General of the Navy to

reimburse officers, enlisted men, and others in the naval service * * *.

Chapter 3, title 38 of the United States Code (38 U.S.C.A. Sections 151-206), provides an elaborate pension system for personal injury and loss of life incurred by officers and enlisted men in the navy. These pensions may be thought an inadequate substitute for the recovery of full damages under the Public Vessels Act of March 3, 1925, but they were well known to all who entered the naval service. The policy evidenced by these statutes has existed for a great many years. If it had been the purpose to change that policy as respects officers and seamen of the navy injured by the unseaworthiness of a public vessel, or by the fault of one another, because that is what in the end it comes to, we cannot think it would have been left to such general language as is to be found in the above-quoted section 1. * * *

We believe that Congress meant to leave upon the members of the naval forces the same risks of injuries suffered in the service of the United States as they had before.

Similarly, in the *Bradey* case, Judge Learned Hand, after pointing to the fact that "the only question before us is whether in these circumstances the United States has submitted to the jurisdiction of the court" (151 F. 2d 742), stated:

> it is quite true that nothing in the text of the Public Vessels Act bars suit by a member of the armed forces, but in *Dobson* v. *United States*, 2 Cir., 27 F. 2d 807, cert. den. 278 U. S. 653, 49 S. Ct. 179, 73 L. Ed. 563, we held

that, because of the compensation elsewhere provided for such persons, they must be deemed excluded from its protection. That case directly rules here; and, to succeed, the libellant must prevail upon us to overrule it. This she attempts to do on the ground that the course of judicial decision since then discloses a change of attitude towards such sufferers.

We can find no evidence of such a change, nor do we see any antecedent reason to think that we were wrong before.[4]

B. *Railroad Control Act of 1918.* In the period of federal control of the railroads during World War I, the Director General of the Railroads was made liable for personal injury and death to the same extent as railroads. Act of March 21, 1918 (40 Stat. 451, 456). These suits were suits against the United States (*Missouri Pacific Railroad Co.* v. *Ault*, 256 U. S. 554, 561; *Dahn* v. *Davis*, 258 U. S. 421, 428; 32 Opinions Attorney General 531, 535 (1921) and servicemen attempting to institute such suits were uniformly relegated to the benefits provided by the military and veterans' laws.

Thus, in *Seidel* v. *Director General of Railroads*, 149 La. 414, the court held that the remedies pro-

[4] In *The West Point*, 71 F. Supp. 206, 212 (E.D. Va.), Navy Officers who were passengers on a United States-owned motor boat which collided with a vessel owned by the City of Portsmouth were held, on the basis of the stated rule, not to be entitled to sue the United States under the Public Vessels Act, but were relegated to redress against the City of Portsmouth for damages and personal injuries incurred in the accident. Similarly, Coast Guard seamen have been held not entitled to sue the United States under that Act. *O'Neal* v. *United States*, 11 F. 2d 869 (E.D.N.Y.), affirmed, 11 F. 2d 871 (C.A. 2).

vided under the federal statute allowing war risk insurance benefits for injuries to servicemen in line of duty are "exclusive" and pointed out that a contrary conclusion would subject the Government to a double liability.

Again in *Nixon v. Hines, Director General of Railroads*, 205 Ala. 355, 87 So. 603, the court sustained a judgment for defendant in a suit by a soldier for personal injuries sustained while traveling on a railroad under federal control. The court ruled that (87 So. at 607-608):

> *The amount of compensation and the remedy * * * prescribed [by War Risk Insurance Act] is exclusive of other measures of and for liability and remedies provided for the protection of the civilian population of the general public.* * * * A slight analogy is also found in the denial of double recovery under the Employees Compensation Act. * * * on account of his status as a soldier when sustaining his injury and his relationship to the government inflicting that injury, a suit by him for said injury sustained in his transportation by the government as a soldier would be against the government, not permitted by an act of Congress, and is denied by public policy. *In re Grimley*, 137 U. S. 147 * * * The reason for this rule is that plaintiff's enlistment as a soldier * * * was a contract with the government which changed his status as an individual and his relation to the state and public * * * creating a new status with correlative rights and duties. [Italics supplied.]

See, to the same effect, *Bryson* v. *Hines*, 268 Fed. 290 (C. A. 4), and cf. *Posey* v. *T. V. A.*, 93 F. 2d 726 (C. A. 5).

C. *New York Tort Claims Act.* *Goldstein* v. *New York*, 281 N. Y. 396, involved a suit under the New York Tort Claims Act (Laws of New York, 1920, c. 922, sec. 12; Laws of New York, 1939, c. 860, sec. 8) against the State for the wrongful death of a state militiaman caused by the negligence of another militiaman. The action was dismissed by the New York Court of Appeals because the State had already, by separate statute, provided pensions for injuries suffered by soldiers and thus set up a "complete system * * * for handling such claims." That court further ruled (281 N. Y. 403):

> The statement that the State may be made liable in damages to a soldier or his dependents, because of injuries inflicted upon him through negligence of a brother soldier or officer, except as provided in Military Law, is rather startling * * *. To justify a decision that another concurrent remedy has been created whereby the State may be made liable in unlimited amounts requires a statute to that effect, the meaning and intent of which is unmistakable.

Similar holdings appear in *Kennedy* v. *New York*, 16 N. Y. Supp. 2d 288; *McAuliffe* v. *New York*, 107 Misc. 553, 176 N. Y. Supp. 679. See *Hambrook* v. *New York*, 185 Misc. 1061, 58 N. Y. Supp. 2d 490.

The uniform holdings of the cited cases are that where the Government has already provided an adequate remedy under legislation setting up pension, disability and other benefits for servicemen injured or killed during their period of service, that remedy ordinarily is exclusive. They further point out that the courts may not, under subsequent legislation, entertain suits for additional damages on account of such injury or death, even though the later statute conferring the right to suit does not expressly except such claims. Congress obviously must have enacted the Federal Tort Claims Act with an awareness of this long established rule. *The "Abbotsford,"* 98 U. S. 440; *United States Navigation Co., Inc. v. Cunard S. S. Co., Ltd.*, 284 U. S. 474, 481; *Overstreet, et al. v. North Shore Corp.*, 318 U. S. 125, 131, 132; *Chicago & Alton Railroad Co. v. United States*, 49 C. Cls. 463, affirmed, 242 U. S. 621; *Plunkett v. United States*, 58 C. Cls. 359; *United States v. Security-First National Bank of Los Angeles, et al.*, 30 F. Supp. 113 (S. D. Cal.), appeal dismissed, 113 F. 2d 491 (C. A. 9); *Progressive Miners of America, et al. v. Peabody Coal Co., et al.*, 7 F. Supp. 340, 346 (E. D. Ill.), affirmed, 75 F. 2d 460 (C. A. 7); *United States v. Albright, et al.*, 234 Fed. 202 (D. Mont.). Accordingly, if the existence of a complete and comprehensive statutory scheme of dealing with a particular subject matter be disclosed, and no contrary

legislative intent be discovered, it must be assumed that in enacting the statute of general application, Congress did not intend it to apply nor consider it as applying to the particular subject matter. This is not the writing of an exception into the general act but rather a judicial recognition that the general act does not apply in the particular field at all.

## II

### Congress Has Provided, Through a Series of Enactments, a Comprehensive System for Compensating Members of the Armed Forces of the United States and Their Dependents for the Injury or Death of Such Members

As the court below observed (R. 31-32), "The soldier, upon enlistment, acquires a special and unique military status, quite different from any relation between the Federal Government and civilians. *United States* v. *Standard Oil Co. of California*, 332 U. S. 301, 305; *In re Morrissey*, 137 U. S. 157, 159; *In re Grimley*, 137 U. S. 147. The soldier is subject to military discipline even while at play, and his desertion is a serious crime, punishable at times by death." The development of the statutory system for caring for injured and disabled members of the armed forces and their dependents and the nature of the compensatory benefits available under current legislation underscores the full extent to which the Government, at the time of passage of the Federal Tort Claims Act, recognized a public obligation to provide for soldier injury or death claims. It constituted, we submit, a complete and comprehensive system.

*A. Development of the Statutory System for Compensating Soldiers' Injury and Death Claims.* The most recent compilation of "Laws Relating to Veterans,"[5] sets forth the text of over 230 federal statutes enacted during 1914 to 1948. Current congressional concern for providing an adequate and specialized system of compensation for a serviceman's injury or death is also evidenced by the introduction during the fiscal year 1947, of approximately 2300 bills pertaining to veterans' benefits,[6] and by the introduction of almost 100 such bills during the first 10 days of the first session of the 81st Congress.[7] This special interest of Congress in military and veterans' affairs is not, however, a phenomenon of World War I or II, but began in the earliest days of our Government.

The need and desirability of providing specially for disabled Revolutionary Army soldiers was stressed early in 1776.[8] Shortly thereafter, the

[5] Compiled by Superintendent, Document Room, House of Representatives, 1948.

[6] Annual Report of the Administrator of Veterans' Affairs, 1947, p. 64.

[7] 95 Congressional Record Index 54-55.

[8] Even before the Revolutionary War, the payment of pensions to injured soldiers was a well-established colonial practice. As early as 1624, the Virginia General Assembly passed laws making special provision for "those that shall be hurt upon service." 1 Hening, Stat. at Large for Virginia, 128. Other examples of pension legislation under the Colonial Laws of Massachusetts, Maryland, New York and Rhode Island are collected in Glasson, *Federal Military Pensions in the United States*, pp. 14-17.

Continental Congress adopted the first national pension law in the United States.[9] This was followed by a long series of other enactments for Revolutionary War Soldiers and their dependents.[10] The expansion of the military forces as a result of the War of 1812 and the Mexican War was accompanied, as was the Revolutionary War, by the passage of numerous other statutes for compensating injured soldiers of those wars.[11] Still additional statutes were passed to compensate soldiers

[9] Ford, *Journals of the Continental Congress*, vol. 5, pp. 469, 702-705. This Act (Act of August 26, 1776), which was to be administered through the various states, authorized half pay to servicemen suffering total disability while in the service of the United States. Proportional relief was authorized for the partially disabled.

[10] Act of September 25, 1778 (*id.*, vol. 12, p. 953); Act of April 23, 1782 (*id.*, vol. 22, p. 210); Act of September 29, 1789, 1st Cong., 1st sess., 1 Stat. 95; Act of March 23, 1792, 1 Stat. 243; Act of February 28, 1793, 1 Stat. 324; Act of April 25, 1808, 2 Stat. 191. In 1816, an increase in pension rates was suggested, in order to reflect the increased cost of living and to allow veterans to support themselves "plentifully and comfortably." House Report, Committee on Pensions and Revolutionary Claims, American State Papers, Claims, 473-474. The Act of April 24, 1816, 3 Stat. 296, was passed to meet this need. Still additional provisions for veterans were sought in President Monroe's message to Congress in December, 1817. 31 Annals of Congress, 15th Cong., 1st sess., 1817-1818, vol. 1, p. 19., See; also, Act of June 7, 1832, 4 Stat. 529; Act of July 4, 1836, 5 Stat. 127; Act of March 9, 1878, 20 Stat. 27.

[11] Act of April 24, 1816, 3 Stat. 296-297; Act of February 14, 1871, 16 Stat. 411; Act of March 9, 1878, 20 Stat. 27; Act of March 19, 1886, 24 Stat. 5; Act of September 8, 1916, 39 Stat. 844; Act of May 13, 1846, 9 Stat. 9; Act of June 3, 1858, 11 Stat. 309; Sec. 3, Act of July 25, 1886, 14 Stat. 230; Sec. 13, Act of July 27, 1868, 15 Stat. 237; Sec. 18, Act of March 3, 1873, 17 Stat. 572; Act of January 29, 1887, 24 Stat. 371; Act of February 6, 1907, 34 Stat. 879; Act of May 11, 1912, 37 Stat. 112.

of the Civil war and their dependents.[12] And, within six months after the United States entered World War I, the President approved a law establishing a detailed and complete compensation system for those who served in that war as well as for their dependents.[13] The World War Veterans' Act of June 7, 1924 (43 Stat. 607, 38 U. S. C. 421) later consolidated and revised the laws affecting the various benefits available to servicemen of World War I and their dependents.[14]

On March 20, 1933, Congress repealed all prior laws granting compensation and other allowances to World War I veterans and their dependents, laid down broad principles for the granting of pensions

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[12] Act of July 22, 1861, 12 Stat. 268, 270; Act of July 4, 1864, 13 Stat. 387; Act of June 8, 1872, 17 Stat. 335; Act of March 3, 1865, 13 Stat. 499; Act of June 6, 1866, 14 Stat. 56, 58; Act of March 19, 1886, 24 Stat. 5; Act of April 19, 1908, 35 Stat. 64; Act of June 27, 1890, 26 Stat. 182; Act of April 24, 1906, 34 Stat. 133; Act of March 4, 1907, 34 Stat. 1406; Act of May 11, 1912, 37 Stat. 112.

[13] Act of October 6, 1917, 40 Stat. 398; Act of June 27, 1918, 40 Stat. 617; Act of July 11, 1919, 41 Stat. 158; Act of March 3, 1919, 40 Stat. 1302; Act of August 9, 1921, 42 Stat. 147, 150; Act of April 20, 1922, 42 Stat. 496; Act of May 11, 1922, 42 Stat. 507; Act of July 1, 1922, 42 Stat. 818; Act of June 5, 1924, 43 Stat. 389; Act of December 18, 1922, 42 Stat. 1064; Act of March 4, 1923, 42 Stat. 1521.

[14] It provided for compensation for service-incurred death and disability, (43 Stat. 615, 38 U. S. C. 471); for burial allowances (43 Stat. 616, 38 U. S. C. 472), for medical, surgical, and dental treatment in addition to compensation (43 Stat. 618, 38 U. S. C. 479), generous life insurance protection (43 Stat. 624, 38 U. S. C. 511); and a complete program for vocational rehabilitation of the disabled serviceman (43 Stat. 627, 38 U. S. C. 531). Compensation rates for specific disabilities were again increased by the Act of May 5, 1926 (44 Stat. 396) and the Act of February 11, 1927 (44 Stat. 1085).

and other benefits and gave the President the authority to prescribe by regulation the administrative details (48 Stat. 8, 38 U. S. C. 701). This is the basic law under which payments are now made for disability or death of servicemen during World War I and II. The Presidential regulations cover pension payments for death or disability during wartime and peacetime service, as well as for death or disability incurred subsequent to service.[15]

B. *Payments and Other Benefits Currently Available under This Comprehensive Statutory Scheme.* The principal benefits available under the 1933 legislation for compensating soldiers and their dependents for disability and death incurred while in service are, together with a vast number of other statutes conferring additional benefits on veterans, codified in Title 38, U.S.C. In addition, Title 10 (Army), Title 34 (Navy) and Title 37 (Pay and allowances of Army, Navy, Marine Corps, Coast Guard) contain many other statutes on military benefits and perquisites. The adequacy and comprehensiveness of this statutory scheme is shown by reference to a few of the more important enactments:

1. Monthly pension payments are provided by law in respect of those servicemen who have incurred partial or total disabling injuries or death

[15] The detailed regulations promulgated by the President under the Act of March 20, 1933, are reprinted at the end of Chapter 12 of 38 U. S. C.

during their period of military service (Act of March 20, 1933, Sec. 1(a), 48 Stat. 8, 38 U.S.C. 701(a); Act of July 13, 1943, 57 Stat. 554). The amount of the disability pension depends, of course, on the degree of disability and may be as high as $300 per month (Act of September 20, 1945, 59 Stat. 533, 534, amending Vet. Reg. No. 1(a), part I, part II (o); see 38 C.F.R. 1946 Supp. 35.06, p. 5913). A disability pension continues to be paid until the serviceman's death or until the disability has ceased. Where, after a pension award has been made, the disability is shown to have increased, commensurate increases in the pension will be made (Act of June 21, 1879, 21 Stat. 23, 30, as amended, 38 U.S.C. 57; 38 C.F.R. Cum. Supp. 3.1216, 4.2117).[16] Moreover, under the Act of July 2, 1948, veterans with a disability of 60 percent or over are entitled to additional payments ranging from $14 to $81 every month, based on their degree of disability and the number of their dependents. (Public Law 877, 80th Cong., 2d sess.)

2. Existing federal laws also provide for the payment of pensions to the widow, children, and

[16] Thus, Welker B. Brooks' disability pension of $27.60 per month, which is now being paid to him as a result of the accident on which his claim against the United States under the Federal Tort Claims Act is based, will be paid to him for his lifetime or so long as the disability resulting from that accident continues. The $27.60 monthly payment, considering Welker's life expectancy will amount to almost $13,000. If at any future date medical examination should reveal that the disability due to that particular accident has increased, his pension will of course be proportionately raised.

dependent mother and father of any soldier who dies as a result of injuries incurred in military service (Act of March 20, 1933, sec. 1(c), 48 Stat. 8, 38 U.S.C. 701(c); 38 C.F.R. 1946 Supp. 35.06, p. 5913). A wife, with one child, is entitled to $78 per month in the event of the death of a soldier in service. For each additional child, the widow is entitled to $15 per month (38 C.F.R. 1946 Supp. 35.06, p. 5913). In cases involving death in service in line of aeroplane or submarine duty, the law authorizes payment to certain widows or surviving parents of a monthly sum equal to twice the amount of the pension normally payable (Act of March 3, 1915, 38 Stat. 940, as amended, 38 U.S.C. 179; Act of April 27, 1928, 45 Stat. 466, 38 U.S.C. 232).[17]

3. A soldier who sustains injuries and is thereby incapacitated from rendering further military service continues to draw his full Army pay for the entire period of his incapacitation. (See Act of May 17, 1926, 44 Stat. 557, 10 U.S.C. 847a; Act of June 16, 1942, 56 Stat. 363, as amended, 37 U.S.C 109,

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[17] In the instant case, the deceased soldier, Arthur L. Brooks, left no wife or children surviving him. An application for a dependency pension filed by his parents, as a result of his death, has been disapproved for lack of a showing that they were dependent upon him. See Appendix B, *infra*, p. 57. However, the statutory pension payments will, of course, be made to the parents upon their furnishing proper proof of dependency. These payments will, upon authorization, continue in accordance with the conditions of the applicable statute (Act of July 30, 1941, 55 Stat. 608, 38 U.S.C. 725) for so long as the parents live.

110; cf. Article of War 107, 41 Stat. 809, 10 U.S.C. 1579; *United States* v. *Standard Oil Co. of California*, 332 U.S. 301, 302). There is consequently no loss of his military earnings due to the injuries he received in the course of his service, even though the injuries were sustained while he was on leave and not engaged in any military duties. When such a soldier is discharged, if the disability which began during his military service should continue, he will, of course, be eligible, as was Welker B. Brooks in the instant case, to receive the applicable monthly pension payments.

4. Soldiers injured during the period of their military service receive free and complete hospitalization and medical care while in service as did Welker B. Brooks in this case (R. 22). Subsequent to their discharge, soldiers are also entitled to receive additional hospitalization and medical care[18] from the Veterans Administration (Act of June 7, 1924, sec. 10, 43 Stat. 610, as amended, 38 U. S. C. 434; Act of March 30, 1933, sec. 6, 48 Stat. 9, 38

[18] This medical care includes the furnishing, by the Veterans Administration, of seeing-eye or guide dogs for blind veterans (Act of May 24, 1944, 58 Stat. 226, 38 U.S.C. 251), and the furnishing of artificial limbs or appliances which are reasonably necessary for any injury sustained by the serviceman (Act of May 23, 1944, 58 Stat. 225, 38 U.S.C. 706b). The Act of August 8, 1946 (60 Stat. 915, 38 U.S.C. 252), moreover, enables the Veterans Administration to provide certain disabled veterans with automobiles by appropriating $30,000,000 to pay the total purchase price, not in excess of $1,600 apiece, to the dealer from whom the veteran is purchasing the automobile. The Act of July 30, 1947 (Public Law 271, 80th Cong., 1st sess.), appropriates an additional $5,000,000 for payment for such automobiles.

U. S. C. 706; 10 C. F. R. Cum. Supp. 77.2(b) and 77.15(b)).

5. Upon the death in the service of a soldier, an amount equal to six months' pay at the rate received by the soldier at the time of his death is paid to his beneficiary (Act of June 3, 1916, as amended, 41 Stat. 367, 57 Stat. 599, 10 U. S. C. 903). Where the deceased person leaves no widow or child the payment of the six-month death gratuity is made to any other relative previously designated by him for that purpose.[19]

6. Soldiers are also granted, upon application, insurance up to $10,000 under the National Service Life Insurance Act (Act of October 8, 1940, sec. 602, 54 Stat. 1009, as amended, 38 U. S. C. 802). Such insurance is available not to the public generally but only to servicemen. The insurance rates are very low in comparison with commercial life insurance rates, since the Government defrays administrative costs and the premiums reflect neither such costs nor that of the cost of waiver of premiums on account of total disability. Sections 606 and 607 of the National Service Life Insurance Act, 54 Stat. 1012, as amended, 38 U. S. C. 806, 807.

So modest are the premium requirements that disbursements of proceeds of this insurance at times have exceeded premium receipts. Annual Report of the Administrator of Veterans Affairs

[19] The six-month death gratuity payable on behalf of the death of Arthur L. Brooks has already been paid to his mother.

for 1933, p. 28; *Lynch* v. *United States*, 292 U. S. 571, 576, note 2. This Court has held the payment of such proceeds to "include both insurance and pension" (*United States* v. *Worley*, 281 U. S. 339, 343; *White* v. *United States*, 270 U. S. 175, 180) and has viewed this insurance as having been "devised in the hope that it would, in large measure, avoid the necessity of granting pensions." *Lynch* v. *United States*, 292 U. S. 571, 576, n. 2.[20]

7. Typical of other federal statutes conferring express benefits are the Act of June 27, 1944 (58 Stat. 388, 5 U. S. C. 852), giving employment preference to veterans who were injured in the course of their military service and who are seeking federal civil service employment, and the statute conferring special farm loan and mortgage insurance privileges on veterans with pensionable disabilities so as to afford such veterans sufficient income which, together with their pensions, will enable them to meet living and operating expenses and the amounts due on their loans (Act of August 14, 1946, 60 Stat. 1073, 7 U. S. C. 1001 (e)).[21]

[20] The deceased soldier in the instant case availed himself of this type of insurance, and his parents are receiving the "insurance and pension" proceeds of a $5,000 government policy.

[21] For a collection of other federal statutes conferring special rights and benefits on veterans, and their dependents, see "Laws Relating to Veterans," 1948 (Superintendent, Document Room, House of Representatives), and Kimbrough and Glen, *American Law of Veterans*. For a complete index and digest of benefits conferred by various state statutes, see State Veterans Laws (79th Cong., 1st sess., House Committee Print No. 8).

In view of these various statutes, it is clear that Congress, at the time of the passage of the Federal Tort Claims Act, had already given ample consideration to the contingencies arising from injuries or death sustained by soldiers and had developed an adequate [22] and comprehensive administrative system to deal with those contingencies.

C. *Similarity of Military Disability Benefits to Workmen's Compensation Systems.* The statutory system developed for the care of servicemen and their dependents has many of the essential features of Workmen's Compensation Laws, providing for persons disabled or killed in industry. Both pro-

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[22] The adequacy of this system is shown by the following information from the Annual Report of the Administrator of Veterans' Affairs for 1947 (pp. 19-28):

As of June 30, 1947, over 1,700,000 World War II veterans were receiving service-connected disability benefits amounting to over 877 million dollars; and over 3,500 World War II veterans were receiving non-service connected disability benefits amounting to an additional two million dollars for the 1947 fiscal year. On the same date, death compensation, at a cost of over 169 million dollars for the 1947 fiscal year, was being paid to dependents of 223,500 World War II veterans for service-connected deaths, and such compensation at an additional cost of over one million dollars for that year was being paid to over 2,000 World War II veterans for non-service connected deaths.

In addition, as of June 30, 1947, over 320,000 World War I veterans were receiving service-connected disability benefits amounting to over 206 million dollars and over 114,000 World War I veterans were receiving non-service connected disability benefits at a cost of an additional 57 million dollars, for the 1947 fiscal year. On the same date, service-connected death compensation was being paid to dependents of 76,760 World War I veterans, at a cost of over 52 million dollars, and at a cost of over 89 million dollars for non-service connected deaths to dependents of 154,000 World War I veterans, for the 1947 fiscal year.

vide for disability compensation without fault. The position of the servicemen may be likened to that of an employee in an extra-hazardous occupation; the United States to that of the employer; and the cost of military deaths or injuries is borne by the national government (the industry). The disability itself, coupled with the existing military relationship, supports the award. While these payments, in private industry, are made only where the injuries occurred in the course of actual employment, Congress has extended the benefits to a serviceman for disability during the entire period of his service, whether he was on active military duty or on furlough or leave at the time he received his injuries. Act of September 27, 1944, 58 Stat. 752, amending Vet. Reg. No. 10, par. VIII. Even in the absence of such statutory extension, it has been recognized that a serviceman is entitled to compensation benefits for injuries sustained while he was away from duty and on leave, inasmuch as the military relationships is continuous and is not broken because of a pass. "A pass granting temporary leave for recreational purposes cannot change this status any more than a leopard can change its spots. It would be *dehors* the principles of military science if it were otherwise." *Globe Indemnity Co. v. Forfeit*, 165 Va. 267, 272. Just as the provisions for the workmen's compensation benefits relieve the private employer from any further liability for the death or injury to his employees

even though the injured employee would obtain a far greater recovery by suit if he could establish the employer's negligence, the analogous and more generous benefits available to servicemen and their dependents should, we submit, relieve the United States of any additional liability. Limiting the private employee to workmen's compensation benefits can not be viewed as discriminating against him even though a third party suffering the same damages through the negligence of the same employer would have access to court action against the employer. Restricting the servicemen to the analogous and more generous benefits of the military and veteran laws similarly can not be viewed as discriminatory. In both instances, relief for injury or death is not subject to the uncertainties, expense and delay of establishing negligence but is guaranteed through direct, administrative payments.

III

**Congress Did Not Intend That the Federal Tort Claims Act Apply to Claims for the Injury or Death of a Member of the Armed Forces**

A. *The Purpose and Legislative History of the Act Confirm the Need for Excluding Soldier Injury and Death Claims from Its Scope*

It is fundamental that a statute must be construed in the light of the result Congress sought to achieve and the evils it sought to remedy. *United States* v. *American Trucking Assn's*, 310 U. S. 534; *South Chicago Coal & Dock Co.* v. *Bassett*, 309

U. S. 251; *International Stevedoring Co. v. Haverty*, 272 U. S. 50; *Warner v. Goltra*, 293 U. S. 155; *Billik v. Berkshire*, 154 F. 2d 493, 494 (C. A. 2); *Binkley Mining Co. v. Wheeler*, 133 F. 2d 863, 871 (C. A. 8), certiorari denied, 319 U. S. 764.

The title of the Legislative Reorganization Act of August 2, 1946, of which the Federal Tort Claims Act appears as Title IV, states its purpose to be "To provide for increased efficiency in the legislative branch of the Government" (60 Stat. 812). Title I of that Act relates in general to the procedural rules of the Senate and House (60 Stat. 841), describes the jurisdiction of the various congressional committees (60 Stat. 815 *et seq.*), and in Section 131 specifically prohibits the introduction of any private bill proposing to authorize the payment of money for property damages or for personal injury damages for which suit may be instituted under the Federal Tort Claims Act (60 Stat. 831). As stated in the title of the Act, its manifest purpose in including its Title IV (the Federal Tort Claims Act), and the concurrent prohibition of introduction of private bills, was designed to promote the efficiency of Congress by eliminating a serious obstacle to its legislative activity (S. Rep. No. 1400 on S. 2177, 79th Cong., 2d sess., pp. 7, 29, 92 Cong. Rec. 10049).

Congress had, prior to the Act of August 2, 1946, been compelled to divert a considerable portion of its time and energies to the consideration of a mass of private legislation, the need for which had arisen

out of damages caused to private parties by tortious conduct of governmental employees.

Widespread dissatisfaction with the private bill system had been long expressed.[23] The need for a Tort Claims Act "to relieve Congress from an intolerable situation which exists in the matter of adjudication of claims" was stressed in reports accompanying early measures on the subject. H. Rep. 667, 69th Cong., 1st sess. on S. 1912, p. 1. The private bill system was a congressional recognition of responsibility for wrongs done to individuals by Governmental fault. However, the congressional machinery utilized to make compensation for such wrongs was cumbersome and placed time-consuming and intolerable burdens on Congress. 69 Cong. Rec. 2184-2185; H. Rep. 2800, 71st Cong. 3d sess., on H.R. 17168, p. 2. As stated in the Committee reports:

> In other words, it may be said that Congress has recognized the general liability of the Government within maximum amounts [for torts].

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[23] For a collected list of Congress' criticisms, see Memorandum for House Committee on Judiciary, Federal Tort Claims Act, Appendix II, printed in records of Hearings before House Committee on Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d sess., p. 49 *et seq.* (1942). See also Gellhorn and Schenck, *Tort Actions against the Federal Government*, 47 Col. L. Rev. 722, 726 (1947); Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 Geo. L. J. 1, 4 (1946); Anderson, *Tort and Implied Contract Liability of the Federal Government*, 30 Minn. L. Rev. 133, 149 (1946); Shumate, *Tort Claims against State Governments*, 9 Law and Contem. Prob. 242, 249 (1942); Luce, *Petty Business in Congress*, 26 Am. Pol. Sci. Rev. 815, 819 (1932); 8 Memoirs of John Quincy Adams 480 (1876).

but the machinery for determining that liability is defective and results in overburdening the claims committees of Congress and Congress itself with the consideration of tort liability claims * * *. [S. Rep. 1699, 70th Cong., 2d sess., on H.R. 9285, p. 4; S. Rep. 766, 71st Cong., 2d sess., on S. 4377, p. 2.]

The measure which included the Tort Claim bill and which finally became the Act of August 2, 1946, was introduced under the heading "More Efficient Use of Congressional Time." Report of the Joint Committee on the Reorganization of Congress, S. Rep. No. 1011, 79th Cong., 2d sess., p. 25. The Tort Claims Act, by making use of the experience of the Judicial branch in adjudication of tort claims, was the answer of Congress to the problems created by the private bill system and was directly intended to increase legislative efficiency by saving time ordinarily devoted to the consideration of private bills. See 92 Cong. Rec. 10049; 69 Cong. Rec. 2181; Hearings before Subcommittee of the H. Committee on Claims, on the General Tort Bill, 72nd Cong., 1st sess., p. 6.

That the Act of August 2, 1946, in substituting access to the courts for settlement of claims which had theretofore been resolved by special legislative proceedings was not directed at reducing the number of private acts passed on account of soldiers' deaths or injuries is evident from the very fact that no appreciable number of such private acts, if any

at all, were enacted in behalf of servicemen. As far as members of the armed forces were concerned, the well-known fact that they were entitled to pension benefits, disability payments, free hospitalization and medical care for any injury occurring during the period of their military service made unnecessary the passage of private acts in their behalf. The Administrator of Veterans Affairs has reported that for each of the years from 1942 through 1947 there were no private acts in effect conferring monetary benefits on veterans of World War II or on their dependents (Annual Reports of the Administrator of Veterans Affairs for 1942, p. 67, for 1943, p. 66, for 1944, p. 68, for 1945, p. 69, for 1946, p. 108, for 1947, p. 146). Actually private bills, which the Federal Tort Claims Act sought to do away with, were those introduced in behalf of members of the public who, because of the doctrine of sovereign immunity to suit, had no other recourse to compensatory relief for injuries or property damage inflicted as a result of negligent governmental activities.

A great number of these private acts were passed in order to compensate for damages caused by the negligent operation of Army vehicles. This was especially true of the five-year period preceding enactment of the Act of August 2, 1946, during which period military training was at its highest peak and the greatest number of military vehicles were in operation. Thus, Part 2 of Volume 59 of

the Statutes at Large shows page after page of Private Laws, passed in the first session of the 79th Congress in order to compensate members of the public who sustained personal injuries or property damages because of the negligence of Armed Forces personnel. It is important to note that each Private Law was enacted to relieve a *civilian* who who suffered as a result of negligent military operations.

Since a similar absence of Private Laws to award damages for death or injury to soldiers characterized the operation of the other Congresses preceding enactment of the Federal Tort Claims Act, it is clear that the Act did not aim at the elimination of such bills, but rather at the elimination of the huge number of private bills which had been introduced in behalf of non-servicemen. See the opinion below, R. 31; *Jefferson* v. *United States*, 77 F. Supp. 706, 712-713 (D. Md.).

The fact that the Act was intended to afford a means of relief to private citizens having personal injury or property damage claims against the United States, rather than to members of the armed forces for such claims, is confirmed by the following explanatory statement set forth at page 31, S. Rep. No. 1400 on S. 2177 (79th Cong., 2d sess.), which became the Legislative Reorganization Act of August 2, 1946:

> With the expansion of governmental activities in recent years, it becomes especially im-

portant to grant to *private* individuals the right to sue the Government in respect to such torts as negligence in the operation of vehicles.[24] [Italics supplied.]

Since it is evident, therefore, that the Federal Tort Claims Act was chiefly designed to authorize adjudication in the courts of those claims which theretofore had been recognized by Congress in Private Laws when asserted on behalf of non-servicemen, it is reasonable to assume that Congress did not intend the Act to encompass an entirely new and distinct group of claims arising out of the death or injury to soldiers for which it had already adequately provided.

B. *Other Provisions of the Act and the Legislative Policy Prohibiting Double Compensation Confirm This View.*

1. Other provisions of the Federal Tort Claims Act show that the Act is not intended to apply to soldier injury or death claims. Section 2672 of

[24] That a soldier acquires a special military status upon becoming a member of the armed forces and is not, during the term of his military service, generally considered or referred to as a "private" individual, is too well settled to require any extended discussion. *In re Grimley*, 137 U.S. 147; *In re Morrissey*, 137 U.S. 157, 159; *United States* v. *Williams*, 302 U.S. 46, 48; *Billings* v. *Truesdell*, 321 U.S. 542, 553. This statement, therefore, furnishes additional evidence that Congress, in enacting the Federal Tort Claims Act, was interested in authorizing judicial settlement of the ordinary run of tort claims asserted against the United States by private citizens, and not by servicemen. See the opinion below; R. 31.

Title 28 U.S.C. (60 Stat. 843) relating to administrative adjustment of tort claims under $1,000, provides that acceptance by the claimant of any award or settlement under the Act "shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States * * * by reason of the same subject matter."[25] Moreover, Section 2679 of Title 28 U.S.C. (60 Stat. 846), dealing with claims in connection with which suit is authorized under the Act, provides that the remedies provided by the Act for tort claims cognizable thereunder in court "shall be exclusive." Consequently, if the Act were interpreted to include claims on account of a soldier's injury or death, it is obvious that recourse to an administrative settlement or court suit under the Act might be deemed as nullifying completely any rights the soldier-claimant or litigant would other-

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[25] This language conforms closely to the Private Laws which Congress intended to eliminate by enacting the Federal Tort Claims Act. *Supra*, p. 33. Those Private Laws, without exception, provide that the damages awarded thereby are "in full settlement" or in "full satisfaction" of all of the beneficiary's claims against the United States as a result of the accident for which the award is made. *E.g.*, Private Law 11, 59 Stat. 688; Private Law 12, 59 Stat. 689; Private Law 134, 59 Stat. 738; Private Law 366, 59 Stat. 836; Private Law 197, 58 Stat. 949; Private Law 589, 58 Stat. 1110; Private Law 49, 57 Stat. 667; Private Law 164, 57 Stat. 717. Where a damage award is so conditioned on fully releasing the United States from all liability, it obviously is of a type unsuited to the needs of a soldier who otherwise would be entitled to pension and disability benefits, hospitalization and medical care, and the other benefits normally due him because he was a soldier at the time the injuries were sustained.

wise have to pension, disability, and other special statutory payments conferred with respect to injured or deceased soldiers. Expansion of the Act to situations which might bring about such a unique and obviously unintended result, depriving servicemen and their dependents of these important statutory benefits, should not be lightly made.

Petitioner's contention that the instant action is maintainable under a literal reading of the Act creates additional instances of undesirable or absurd consequences [26] which Congress could not be presumed to have intended, and which can be avoided only by adoption of the more reasonable interpretation that that Act does not apply to suits for damages arising out of injury or death of a soldier. See opinion below, R. 34-35.

Thus, Section 2680(j) of Title 28 U.S.C. (60 Stat. 846), specifically excludes from the operation of the Act "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." Unless the Act is deemed to exclude from its scope suits by soldiers, it is clear from this exclusionary provision that a soldier or his survivor, who would otherwise be entitled to sue the United States under the Federal Tort Claims Act, is deprived of such right to sue because the soldier was injured or killed as a result

[26] Even where the plain, literal meaning does not produce absurd results but merely an unreasonable one, it is to be avoided. *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 543. See, also, *Boston Sand Co.* v. *United States*, 278 U.S. 41, 48; *United States* v. *Dickerson*, 310 U.S. 554, 561.

of combat activities in wartime. The result therefore would be that a serviceman, injured in the course of a non-combatant activity would receive greater compensation than one injured in combat through the negligence of his comrades. We submit that no such intent may be imputed to Congress.

Similarly, Section 2680(k) of Title 28 U.S.C. (60 Stat. 846) excludes from the operations of the Federal Tort Claims Act claims "arising in a foreign country." If the statute is interpreted to authorize suits by servicemen, the exclusionary language of Section 2680(k) would mean that the soldier, who was ordered to overseas duty in order to fight in a foreign battlefield, would be deprived of rights to sue the United States for personal injuries otherwise covered by the Federal Tort Claims Act, whereas the soldier who was stationed in the United States, and thus freed of the dangers inherent in overseas military assignments would be allowed to sue under that Act.

The only possible construction, we submit, which would avoid these highly inequitable and illogical results, is to view the Act as affording redress to civilians injured by the tortious conduct of governmental employees, and to require all soldiers who have been so injured in the course of their service to satisfy their claims for such injuries through the payments and benefits normally due them under the general and comprehensive statutory scheme specifically designed to afford them such relief.

2. This general congressional policy of prohibiting the United States from conferring duplicate compensation benefits on a serviceman for personal injuries sustained during his period of service is not a recent development but was formally articulated by Congress as early as 1818 and has been consistently adhered to since that time. The Act of March 18, 1818, specifically provided that its benefits would be made available only to those who relinquished their claims to every other pension theretofore allowed under federal law. 3 Stat. 410. A later Act of July 23, 1882 (22 Stat. 176, 38 U. S. C. 29), also provides that a veteran may not receive additional statutory benefits for the same injuries for which he is drawing benefits under the general pension laws unless the statute conferring the additional benefits "expressly states that the pension granted thereby is in addition to the pension which said person is entitled to receive under the general law."

This congressional policy is again evidenced in the World War Veterans' Act of 1924 (Act of June 7, 1924, 43 Stat. 607, as amended, 38 U. S. C. 421 *et seq.*), which provides that for disability and deaths of servicemen compensable under that Act, no other pension law or laws providing for gratuities or payments shall be applicable (Section 212, 43 Stat. 623, as amended, 38 U. S. C. 422), and which also requires surrender of any gratuity or pension payable on account of the same injury or

death (Sections 201 and 202, 43 Stat. 616, 618, as amended, 38 U. S. C. 472 and 489). Moreover, the Military Claims Act (Act of July 3, 1943, 57 Stat. 372, as amended, 31 U. S. C. 223b), in allowing the Secretary of the Army to settle claims arising out of acts or omissions of military or civilian employees of the Army, specifically excludes "claims for personal injury or death of military personnel."

Still additional manifestation of this policy of prohibiting dual compensation for deaths or injuries occurring in military service is found in the congressional rewriting in 1943 of Veterans Regulation No. 10, Par. XIII so as to prohibit the concurrent payment of more than one award, pension, or compensation to any person based on his service (Act of July 13, 1943, 57 Stat. 554, 559), and in the statute prohibiting the payment of federal employee compensation benefits for certain injuries or deaths for which a pension based on military service is being paid by the United States (Act of July 15, 1939, 53 Stat. 1042, as amended, 5 U.S.C. 797).

C. *The failure of Congress to retain a specific provision excepting persons entitled to the benefits of the World War Veterans Act of 1924 as amended from the operation of the Federal Tort Claims Act, does not indicate a legisla-*

[27] For administrative rulings, by the Attorney General, implementing this well-settled congressional policy, see 37 Op. A. G. 87 (1933), and 36 Op. A. G. 164 (1930).

*tive intent to make that Act applicable to claims on account of injuries or deaths of members of the armed forces.*

Chief Judge Parker, in his dissenting opinion below, lays great stress on the fact that not only does the Act itself fail to contain a specific exception of claims for personal injury or death of a serviceman but that H. R. 181, 79th Cong., 1st sess., which was a general tort claims bill, and the immediate predecessor of the bill which became the Federal Tort Claims Act did contain the following exception:

> (8) Any claim for which compensation is provided by the Federal Employees Compensation Act, as amended, or by the World War Veterans Act of 1924, as amended.

He argues that legislative elimination of this exception in the Federal Tort Claims Act was deliberate and must be taken as evidence of a legislative intent to include claims for personal injury or death of members of the armed forces. While admitting that the omitted exception did not exclude claims of servicemen *eo nomine*, he argued that the only disability allowance which they or their dependents could receive was that provided by the World War Veterans Act of 1924, as amended. We submit that these conclusions are based on false premises and are incorrect.

1. *The 8th exception in H. R. 181, 79th Cong., 1st sess., was not intended to cover claims for the injury or death of members of the armed services.*

Commencing with the 68th Congress, 1st session and extending through the 74th Congress, 18 tort claims bills were introduced.[28] These bills generally did not give the claimant access to the courts but afforded recourse only to the Employees Compensation Commission or the General Accounting Office, with a right to reassert certain types of claims in the Court of Claims. All but two of these bills (H. R. 12178, 68th Cong., 2d sess. and H. R. 8561, 73rd Cong., 2d sess.) contained exceptions of claims of members of the armed forces. Fourteen contained the following exception:

> Any claim for injury or death in ~~line of duty~~ by any member of the military or naval forces,

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[28] H. R. 12178—68th Cong., 2d sess.
H. R. 12179—68th Cong., 2d sess.
S. 1912—69th Cong., 1st sess.
H. R. 6716—69th Cong., 1st sess.
H. R. 8914—69th Cong., 1st sess.
H. R. 9285—70th Cong., 1st sess.
S. 4377—71st Cong., 2d sess.
H. R. 15428—71st Cong., 3rd sess.
H. R. 16429—71st Cong., 3rd sess.
H. R. 17168—71st Cong., 3rd sess.
H. R. 5065—72nd Cong., 1st sess.
S. 211—72nd Cong., 1st sess.
S. 4567—72nd Cong., 1st sess.
S. 1833—73rd Cong., 1st sess.
H. R. 129—73rd Cong., 1st sess.
H. R. 8561—73rd Cong., 2d sess.
H. R. 2028—74th Cong., 1st sess.
S. 1043—74th Cong., 1st sess.

in cases where relief is provided by other law.[29]

Each of the fourteen bills also carried the additional exception:

> * * * claims for which compensation is provided by the Federal Employees Compensation Act, as amended, or by the World War Veterans Act of 1924, as amended. (United States Code, Title 38, ch. 10.)

Thus it is clear that through six Congresses the proponents of tort claims bills were of the opinion that persons entitled to the benefits of the World War Veterans Act were a distinct and separate class from those who were members of the armed forces and that each exception was separate and distinct.

No tort claims bills were introduced in the 75th Congress. Commencing with the 76th Congress and through the 79th Congress, eleven tort claims bills were introduced, each of which contained the exception for the World War Veterans Act of 1924,[30] but none of which contained the exception

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[29] In H. R. 12179, 68th Cong., 2d sess. and H. R. 8914, 69th Cong., 1st sess., the exception read:

> This Act shall not apply to any soldier, sailor or marine of the United States for injuries received in time of duty.

These two bills did not contain an exception dealing with persons entitled to the benefits of the Federal Employees Compensation Act and the World War Veterans Act of 1924.

[30] Section 303(8), H. R. 7236, 76th Cong., 3rd sess; Section 303(8), S. 2690, 76th Cong., 1st sess; Section 402(8), S. 2207, 77th Cong., 2d sess; Section 402(a)(8), S. 2221, 77th Cong., 2d sess; Section 303(8), H. R. 5299, 77th Cong., 1st

of claims for personal injuries of members of the armed forces. These bills, at times, were drafted in conjunction with the Department of Justice. H. Rep. No. 1287, 79th Cong., 1st sess., p. 7. It is reasonable to conclude that the omission of the specific exemption for members of the armed services resulted not only from congressional awareness of the decision in *Dobson* v. *United States*, *supra*, which would make such an exception unnecessary but also from departmental awareness of that decision and its implications. So far as we have been able to discover, no reference to claims for injuries or death of members of the armed services appears in the hearings, reports or debates on any of these bills.

2. *The World War Veterans Act of 1924 as amended is not applicable to members of the armed forces who might institute suit under the Federal Tort Claims Act.* The World War Veterans Act has a very restricted scope, as far as service-time incurred injuries are concerned. It covers injury or death sustained by servicemen of World War I, during the period from 1917-1921.

Section 212 of the Act of June 7, 1924, 43 Stat. 623 (38 U.S.C. 422), provides:

> This Act is intended to provide a system for the relief of persons who were disabled,

sess; Section 402(8), H. R. 6463, 77th Cong., 2d sess; Section 303(8), H. R. 5373, 77th Cong., 1st sess; Section 402(8), H. R. 1356, 78th Cong., 1st sess; Section 303(8), H. R. 817, 78th Cong., 1st sess; Section 402(a)(8), S. 1114, 78th Cong., 1st sess; Section 402(a)(8), H. R. 181, 79th Cong., 1st sess.

and for the dependents of those who died as a result of disability suffered in the military service of the United States between April 6, 1917, and July 2, 1921.

Section 200 of the 1924 Act, 43 Stat. 615 (38 U.S.C. 471), further provides:

> For death or disability resulting from personal injury suffered or disease contracted in the military or naval service on or after April 6, 1917, and before July 2, 1921, * * * the United States shall pay * * * compensation as hereinafter provided * * *.

Obviously, the World War Veterans Act of 1924 could have had no application here. The soldiers involved sustained their service-time injury and death during World War II. For World War II disability or death, pension payments are made by the Veterans Administration under the Act of March 20, 1933 (38 U.S.C. 701), and not under the 1924 Act. In fact, since the Federal Tort Claims Act recognizes only those claims accruing after January 1, 1945, the 1924 Act can not apply to any claim under the Federal Tort Claims Act for a military service-incurred death or disability.

Furthermore, the 1924 Act as amended covers a large group of persons no longer members of the armed forces, and certain injuries which they receive in civilian life make them eligible for limited disability benefits and entitle their dependents to certain dependency allowances on their death. It is to this class of persons that the omitted amend-

ment was directed and not to members of the armed forces. Contrary to the conclusions of the dissenting judge below, therefore, we think it clear that the legislative history of tort claims bills indicate that Congress was not concerned with claims for injury or death of members of the armed forces as it initially assumed that the bills would not apply to them at all.

D. *Practical Considerations Confirm the View that Congress Did Not Intend that the Act Apply Either to Service-Connected or Service-Caused Injuries or Death.*

As the court below remarked (R. 35-36):

> * * * It is easy to conjure up the unfortunate results, including the subversion of military discipline, if soldiers could sue the United States for injuries incurred by reason of their being in the armed service of their country. If soldiers could sue for such injuries as illness based on the alleged negligence of the company cook or mess sergeant, or if soldiers who contract sickness on wintry sentry duty had a right of action against the Government on the allegation of a negligent order given by the company commander, then the traditional grousing of the American soldier would result in the devastation of military discipline and morale.

Congress must have been aware of these considerations. Had it contemplated that the Act would apply to members of the armed services in respect of personal injury or death, it certainly would have made some appropriate provision therefor. The

same observation is true if Congress intended the Act to apply to service-connected but not service-caused disabilities.

Petitioners, in evident agreement that soldiers who have sustained service-caused injuries (*i.e.*, those resulting from direct, military activity) should be confined to the benefits available under military and veterans' laws, argue, however, that soldiers, like petitioners, whose injuries and death were merely service-connected (*i.e.*, those occurring during the period of the soldier's service, but while he was on leave or furlough from military duties) should not only have access to such benefits but also the right to sue for additional damages under the Federal Tort Claims Act (Pet. 16-17, 21-22).

The court below readily admitted "the added and greater reason for denying recovery where the injury is service-caused * * * than where the injury is not service-caused * * *" (R. 35). However, the court rejected the attempted distinction, stating that there is nothing in the Act "which would justify us in holding that Congress intended to include death of, or injury to, a soldier, which was not service-caused * * * and to exclude service-caused injury or death" (R. 36). While it is true that benefits under the military and veterans' laws are payable when the serviceman's injury or death occurred in "line of duty," Congress has specifically defined that term to include any injury or death incurred during the serviceman's period of military service, whether the

soldier at the time of his injury or death was on furlough, authorized leave, or on active duty. Act of September 27, 1944, 58 Stat. 752 amending Vet. Reg. No. 10, Par. VIII; see 38 C. F. R. 1944 Supp. 35.10(h); 32 Op. A. G. 12 (1919); Dig. Op. JAG (1912-1940) 952; *Moore* v. *United States*, 48 C. Cls. 110. As pointed out by the court below, the fact that payments have already been made by the United States on account of the death of Arthur L. Brooks and the injuries of his brother, Welker, shows the practice where the serviceman is on leave (R. 32), and shows that the distinction stressed by petitioners is unsound.

The fact that these payments were made also shows that the *Dobson, Bradey,* and related cases are, despite petitioner's assertion to the contrary, completely applicable here. The rationale of those cases was not, as contended by petitioner, the fact that the injuries were service-caused, but rather that there was in existence a comprehensive statutory system for making payment on such claims. See opinion below, R. 32-34; *supra*, p. 12.[31]

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[31] In addition to the decision below, which is the only appellate decision on the question, nearly all district court decisions have so construed the Federal Tort Claims Act. *Jefferson* v. *United States*, 77 F. Supp. 706 (D. Md.); *Troyer* v. *United States*, 79 F. Supp. 558 (D. Mo.); *Atkinson* v. *United States*, unreported (D. Colo.); *Griggs* v. *United States*, unreported (D. Colo.); *Feres* v. *United States*, unreported, (N.D. N.Y.); see also, *Perucki* v. *United States*, 80 F. Supp. 959 (M.D. Pa.); *Wham* v. *United States*, 81 F. Supp. 126 (D. D.C.); *DeRey* v. *United States*, unreported (D. Puerto Rico). It should be noted that Judge Chesnut's initial and tentative conclusion in the *Jefferson* case was that the Federal Tort Claims Act does cover claims

## IV

**Acceptance of Benefits under the Military and Veterans' Laws Bars Suit under the Federal Tort Claims Act**

Petitioner's contention that the question of whether the acceptance of statutory pensions and other compensation bars the instant action was decided by the court below against the Government (Pet. 26) is obviously unsound. The court below did not even discuss this question. If it had, we submit, it should have ruled that the acceptance of the statutory benefits for servicemen and their dependents bars subsequent action for damages under the Federal Tort Claims Act. Prior cases under related legislation have all so held: *Dahn* v. *Davis*, 258 U. S. 421; *Sandoval* v. *Davis*, 288 Fed. 56 (C. A. 6); *Militano* v. *United States*, 156 F. 2d 599 (C. A. 2); *United States* v. *Marine*, 155 F. 2d 456 (C. A. 4); *Lassell* v. *Mellon, Director General of Railroads*, 219 App. Div. 589, 220 N. Y. Supp. 235.

In the *Sandoval* case, two soldiers who were injured and a third who was killed as a result of negligent operations of a railroad under federal control sued the United States for damages. In the Director General's answers to the complaints filed on behalf of the soldiers, the defense that no liability

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for injuries or deaths of servicemen (74 F. Supp. 203). However, after complete and careful reconsideration, Judge Chesnut ruled that such claims are not within the scope of the Act (77 F. Supp. 706). Three district courts have adopted the earlier conclusion which Judge Chesnut later rejected, *Alansky* v. *Northwest Airlines*, 76 F. Supp. 556, 559 (D. Mont.); *Samson* v. *United States*, 79 F. Supp. 406 (S.D. N.Y.); *Armstrong* v. *United States*, unreported, (D. Tenn.).

exists with respect to such killed or injured soldiers was set up. Plaintiffs' demurrer to this defense was overruled, and the District Court, entering judgment for the defendant on the pleadings, held (*Sandoval* v. *Davis*, 278 Fed. 968, 972-974 (N. D. Ohio)) that no recovery could be allowed

> because of the compensation provisions of the War Risk Insurance Act.
>
> * * * *
>
> In this case * * * the two injured plaintiffs and the beneficiaries [of the deceased soldier] in the other case have been awarded and have received and accepted compensation. In this situation the present actions are prosecuted by the plaintiffs to recover additional compensation from the United States, which has already made compensation for such injuries and death, and are not actions against persons other than the United States causing such injury and death.
>
> * * * * * * *
>
> * * * Congress did not intend to confer upon an injured or killed soldier or sailor a right to a double recovery of compensation from the United States.

On appeal, the Sixth Circuit Court of Appeals affirmed the District Court's decision and ruled that even though the veterans' benefit acts, under which the plaintiff had been compensated, contained no language indicating that such benefits were exclusive, acceptance of the benefits precluded suit against the United States (288 Fed. 56). The same result has recently been reached by the Tenth

Circuit Court of Appeals in a suit by a civilian employee of the United States under the Federal Tort Claims Act. *Parr* v. *United States*, January 21, 1949, 17 U. S. Law Week 2348. No reason exists which would justify a different conclusion where the suit under the Federal Tort Claims Act is instituted by a military employee of the Government.

As shown above, petitioners are receiving all benefits and payments to which they are by law entitled. The benefits here, with respect to the injured serviceman, include a lifetime, monthly disability pension of $27.60, valued at about $13,000; free hospitalization and medical care. With respect to the deceased serviceman, the six-month gratuity payment has been made, and monthly pension payments will be made to his parents upon their furnishing proper proof of dependency. No disavowal of these, or other payments such as the insurance benefits mentioned above, has been made. Receipt of these statutory payments constitutes, we submit, a bar to the present actions.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the decision below should be affirmed.

PHILIP B. PERLMAN,
*Solicitor General.*
H. G. MORISON,
*Assistant Attorney General.*
PAUL A. SWEENEY,
MORTON HOLLANDER,
*Attorneys.*

FEBRUARY, 1949.

APPENDIX A

The pertinent provisions of the Federal Tort Claims Act [32] provide as follows:

28 U.S.C. 1346. UNITED STATES AS DEFENDANT

* * * * * *

(b) Subject to the provisions of chapter 173 [33] of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * * *

28 U.S.C. 2680. EXCEPTIONS

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a

[32] See footnote 1, *supra*, p. 2.

[33] Apparently should read "171" since that is the number of the chapter on Tort Claims Procedure.

statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

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APPENDIX B

The Letter from the Veterans' Administration the Attorney General:

VETERANS' ADMINISTRATION

Branch Office No. 4
900 North Lombardy Street
Richmond 20, Virginia

Your File Reference: PF:FM
157-55-4

In reply refer to: RVSB
XC-3, 867,378
Brooks, Arthur L.

AUGUST 12, 1947.

THE ATTORNEY GENERAL
*U.S. Department of Justice*
*Washington 25, D.C.*

DEAR SIR: This is in reply to your letter dated July 30, 1947, wherein you request duplicate sets of the "XC" file (XC-3, 867, 378) of the above-named deceased veteran and information as to any awards of benefits made on account of the veteran's death with reference to the statutes and regulations under which the awards were made.

There are no duplicate copies of the "XC" file although the original is, of course, subject to judicial process. For your information, the file contains the following papers:

(1) Application for National Service Life Insurance of Arthur Lorrane Brooks in the amount of $5,000.00. He named his mother, Maggie Hathcock Brooks and his father, James Marshal Brooks of Route 9, Box 73, Charlotte, North Carolina as coprincipal beneficiaries. His sister, Mildred Brooks, was named contingent beneficiary. Payments of National Service Life Insurance were approved and are presently being made to the mother and father. There are a number of letters and forms pertaining to payment of National Service Life Insurance.

(2) Report of Death from the War Department, Adjutant General's Office dated March 6, 1945 which shows that Arthur Lorrane Brooks, Army Serial Number 34,256,644, enlisted March 20, 1942 and died February 17,

1945; the cause of death was "Traumatic shock due to fracture of ribs, laceration of diaphragm, spleen and liver; massive hemothorax bilateral". The death was held to be in line of duty and not caused by misconduct.

(3) A delayed birth certificate of the veteran shows that he was born June 2, 1912 at Harrisburg, North Carolina.

(4) Photostat copies of the Report of Investigation by a Board of Officers at Fort Bragg, North Carolina dated February 21, 1945. The original report and exhibits are in the possession of the War Department, Adjutant General's Office. A copy of the finding approved by the Adjutant General contains the following remarks: "Testimony obtained from all witnesses except the passengers in Sgt. Brooks' vehicle who were critically injured. The accident was evidently caused by Sgt. Brooks' failure to observe the approaching Army truck due to bad weather conditions. There is no indication that Sgt. Brooks was intoxicated or under the influence of drugs at the time of the accident. No coroner's inquest has been held at this time."

(5) Claim by both mother and father on VA Form 535. This claim was disallowed on March 11, 1946, because dependence was not established. The claimants were notified of the disallowance action on March 11, 1946.

It will be noted that the original records dealing with the immediate circumstances sur-

rounding the veteran's death are in the possession of the War Department, Adjutant General's Office.

Very truly yours,

[S.] W. B. UPPERCUE,
*Director, Claims Service.*

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